IN THE MISSOURI SUPREME COURT

In the Interest of:	**)**	
	)	
P.L.O. and S.K.O.,	**)**	**Case No. SC85120**
	)	
Minor children.	**)**	

Appeal from the Circuit Court of Newton County, Missouri

Juvenile Division

Honorable John LePage, Judge

Appellant's Brief

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ORAL ARGUMENT REQUESTED

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Reference Note

All statutory references are to the Revised Statutes of Missouri, 2002. References to the Legal File are denoted "LF," to the Transcript are denoted "TR," and to the Appendix as "A." References to page numbers in "Mother's Exhibit A" refer to hand written page numbers in the upper right corner. Mother's Exhibit A consists of exerpts from the Division of Family Services file and medical records for the minor children.

ALPHABETICAL TABLE OF CASES and AUTHORITY

Community Bancshares, Inc. v. Secretary of State, 43 S.W.3d 821 (Mo.banc 2001)

Congressional Record, (House debates April 30 and November 13, 1997; Senate debates September 18, November 8, and November 13, 1997.)

Constitution of Missouri, Article 1, Sections 2, 5, 7, and 10

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D.E.J. v. G.H.B., 609 S.W.2d 472 (Mo.App.W.D. 1980)

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Hatcher v. Hatcher, 103 S.W.3d 860 (Mo.App.E.D. 2003)

In Re B.C.K., 103 S.W.3d 319 (Mo.App.S.D. 2003)

In Re M.O., 70 S.W.3d 579 (Mo.App.W.D. 2002)

In the Interest of B.R.S., 937 S.W.2d 773 (Mo.App.W.D. 1997)

In the Interest of C.N.G., WD 62428 (Mo.App.W.D. 2003)

In the Interest of E.L.B., 103 S.W.3d 774 (Mo.banc 2003)

In the Interest of F.A.C., 973 S.W.2d 157 (Mo.App.W.D. 1998)

In the Interest of J.P., 947 S.W.2d 442 (Mo.App.W.D. 1997)

Keen v. Dismuke, 667 S.W.2d 452 (Mo.App.S.D. 1984)

Lawrence v. Texas, 02-102 (U.S. 2003)

M.L.B. v. S.L.J., 519 U.S. 102 (1966)

Marriage of Woodson, 92 S.W.3d 780 (Mo.banc 2003)

Matter of Guardianship of G.S., 644 A.2d 1088 (N.J. 1994)

Missouri Resource Guide for Best Practices in Child Abuse and Neglect Cases, (2001)

Missouri Supreme Court Commission on Children's Justice, Final Report, June, 2003

Missouri Supreme Court Rule 111.13(c) (2003)

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Missouri Supreme Court Rule 84.08 (2003)

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Section 167.031.1 RSMo 2002

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Section 211.447 RSMo 2002

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Suffian v. Usher, 19 S.W.3d 130 (Mo.banc 2000)

Troxel v. Granville, 530 U.S. 57 (2000)

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United States v. Mendenhall, 446 U.S. 544 (1980)

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JURISDICTIONAL STATEMENT

This action involves the constitutionality of two state statutes in a termination of parental rights case. The first concerns the question of whether the state may use a time frame for which a child has been in foster care as a ground for termination of parental rights. (RSMo 211.447.2(1)). The second concerns the question of whether the undefined term "emergency" renders the statute void for vagueness. (RSMo 211.183.1).

This Court has exclusive jurisdiction pursuant to Article V, Section 3 of the Missouri Constitution because the case involves the validity of state statutes.

STATEMENT OF FACTS

The Division of Family Services (DFS) had intermittent involvement with the appellant and her family for years. Prior to the opening of this case in 1997, DFS's most recent case with the family was closed in November, 1996 after DFS found that the family functioned and that there was a low safety risk for the children in spite of poverty and questionable parenting skills. (Mother's A at 2).

Allegations of sexual abuse were raised against Father, the appellant's husband, by G.O., a child of the appellant, in April 1997. (Mother's A at 428-442). Appellant immediately removed her husband from the home. (Mother's A at 2, TR 195, 718). Father resided elsewhere from that point forward, although he was never charged with sexual abuse. (TR 564, Mother's A at 99).

After April, 1997, the appellant resided in the family's 3-bedroom trailer with her five youngest children, then ages 6 through 17, after she removed Father from the home. (TR 713). The family lived on welfare funds of less than $1,000.00 per month as the appellant, mother of nine children, had not worked since 1973 and continued to remain at home with her children. (TR 713, 714).

At the request of the Newton County DFS, the juvenile officer, accompanied by the Sheriff's department and DFS, forcibly removed the appellant's five children from her home on September 2, 1999 prior to obtaining a court order. (Mother's A at 28). The juvenile officer filed her Petition for Protective Custody on September 3, 1999. (LF 11). The petition alleged that the children were in need of care because "the parents neglected, failed, refused, or are unable to provide the care and support necessary for their well-being." (LF 11). The petition further alleged that "the children have suffered from chronic head lice which has resulted in them missing numerous days of school, to the point that G.O. is two years behind. [G.O. is not a subject of this appeal.] The home is below minimal standards as there are soiled clothes and dirty dishes piled in the floor. There is food on the carpet and filth throughout the home. The biological mother does not follow through with medical treatment for the children." (LF 11, 12).

The juvenile court entered its Order of Protective Custody on September 3, 1999. (LF 13). That same day, the court entered its Order Terminating Jurisdiction over G.O., the oldest child and the same child who raised sexual allegations against Father. She was returned to the appellant's home. (LF 15). The other four children remained in foster care. The

youngest two, P.L.O. and S.K.O., are the subjects of this appeal. The guardian ad litem was appointed for the children sometime between September 3, 1999 and November 19, 1999, although the record is unclear on this point. (LF 1).

The trial court's docket shows that no action was taken on this case in the juvenile court after the children were removed on September 2, 1999, until DFS filed its first Children's Services Case Plan on April 17, 2001. (LF 1). However, the appellant participated extensively with DFS during that eighteen months in efforts to return the children to her home, even though DFS did not develop a written service agreement outlining the requirements for the return of her children until September 15, 2000. (Mother's A at 67, Petitioner's Exhibit 15). The last time the appellant was allowed to see P.L.O. and S.K.O. was February 13, 2001. (TR 768-770). DFS prohibited the appellant from having any children in her home, including visiting grandchildren. (Mother's A at 72). On June 8, 2001, DFS filed its Investigation and Social Summary, and on June 20, 2001, filed its first Report to the Court. (LF 1, 25, 38).

DFS placed P.L.O. and S.K.O. with the foster/pre-adoptive family in May, 2001. By the end of that month, the children were allowed to begin

using new first and last names. (Mother's A at 103, 132). The foster parents filed their Petition for Adoption in a separate case on July 30, 2001. (LF 208, 212). The first judicial docket entry in either case occurred on August 16, 2001, when the court scheduled a case review in the underlying abuse/neglect case for September 7, 2001. (LF 1).

Appellant was served with defective notice on the foster parents' adoption on August 6, 2001, and applied for court-appointed counsel on September 4, 2001. (LF 217, 208, 1). Counsel was appointed for the appellant in the juvenile abuse/neglect case on September 7, 2001, but did not receive notice of that appointment in time to attend the first pre-trial conference on September 13, 2001. (LF 1). Court-appointed counsel in the juvenile abuse/neglect matter entered her appearance in the collateral adoption case on October 9, 2001. (LF 209). The adoption case was placed on hold when *the first hearing ever held on either case took place on January 24, 2002*, two years and four months after the children were taken from the appellant's home. (LF 210). The adoption case and the abuse/neglect case were consolidated on June 27, 2002. (LF 4).

Hearings on the termination of parental rights were held on September 26 and 27, and October 1, and 17, 2002. (LF 6, 7). The court's docket entry of October 31, 2002 found ". . . by clear, cogent and convincing evidence

that multiple grounds for termination exist, including but not limited to: educational neglect, medical neglect, length [of time] in foster care, abandonment, physical abuse, and failure to rectify." (LF 7). The docket entry did not specify whether these grounds for termination existed as to the appellant or the Father. Judgment terminating the appellant's parental rights was entered on November 21, 2002. (LF 8, 135).

The appellant filed several post-trial motions, including a motion to reconsider judgment, motion for new trial, motion to vacate judgment, and motion for entry of proposed judgment. (LF 8, 149, 154, 157, 161, 163, 185). All post-trial motions were denied on January 21, 2003. (LF 8).

The trial court entered its Order allowing the appellant to proceed on appeal in forma pauperis on January 21, 2003. (LF 9, 187). Appellant's request for transcript was filed on November 26, 2002, and her notice of appeal to the Missouri Court of Appeals, Southern District was timely filed on January 21, 2003. (LF 9, 188, 191). Appellant then dismissed her appeal in the Southern District, and filed her amended notice of appeal in this Court on February 10, 2003 because of the constitutional questions involved.

POINTS RELIED ON

1. The trial court erred in terminating the appellant's parental rights based on RSMo 211.447.2(1) because that statute is unconstitutional, in that the time period of fifteen out of the most recent twenty-two months that a child remains in foster care as a *ground* for termination of parental rights is arbitrary, capricious, and violates Article 1, Sections 2 and 10 of the Missouri Constitution and the 14th Amendment of the United States Constitution by depriving the appellant of her liberty interest in the care, custody and management of her children without due process of law.

AUTHORITY

Blakely v. Blakely, 83 S.W.3d 537 (Mo.banc 2002)

Lawrence v. Texas, 02-102 (U.S. 2003)

Santosky v. Kramer, 455 U.S. 745 (1982)

Troxel v. Granville, 530 U.S. 57 (2000)

Adoption and Safe Families Act, (P.L. 105-89)

Congressional Record, (House debates April 30 and November 13, 1997; Senate debates September 18, November 8, and November 13, 1997.)

Constitution of Missouri, Article 1, Sections 2 and 10

Missouri Supreme Court Rule 119.08 (2003)

Section 211.447.2(1) RSMo 2002

Section 211.447.3 RSMo 2002

Section 211.447.5 RSMo 2002

United States Constitution, Fourteenth Amendment

2. The trial court erred in terminating the appellant's parental rights because the court failed to follow and failed to require all parties involved to follow mandatory procedures, thereby violating the appellant's procedural and substantive due process rights under Article 1, Sections 2 and 10 of the Missouri Constitution and the 4th and 14th Amendments of the United States Constitution, and her religious freedom guaranteed by the First Amendment of the United States Constitution and Article 1, Sections 5 and 7 of the Missouri Constitution, in that the trial court:

a) improperly assumed jurisdiction of the children of the children pursuant to RSMo 211.183.1 because that statute is unconstitutional in that it does not define the term "emergency";

b) allowed the juvenile officer to remove the children from the home without making reasonable efforts to prevent removal, without the existence of emergency conditions, and without a court order, in violation of the Adoption and Safe Families Act, RSMo 211.183.1, RSMo 211.183.5, and the 4th Amendment of the United States Constitution;

c) failed to make findings as required by RSMo 211.183.3 and RSMo 211.183.5 in its Order of Protective Custody;

d) failed to give the appellant written notice of her right to a protective custody hearing as required by Supreme Court Rule 111.13(c) and RSMo 211.032.1;

e) failed to hold a dispositional review hearing within 12 months from the time the children were placed in foster care as required by Supreme Court Rule 119.08(a);

f) failed to hold a permanency hearing within 12 months of the time the children were placed in foster care as required by RSMo 210.720;

g) failed to make efforts to place the children in a foster home of the same religious faith as that of the birth family as required by RSMo 211.221;

h) failed to review the status of the children every six months as required by RSMo 210.730;

and the Division of Family Services:

i) failed to file a written status report on the children every 6 months following foster care placement as required by RSMo 210.720.1;

j) failed to develop a case plan for the children within thirty days as required by 13 CSR 40-30.010(2);

k) failed to develop a written service plan within 72 hours of placement and failed to evaluate the progress of the appellant and children every three months as required by 13 CSR 40-73.075;

l) ceased reasonable efforts to reunite the children with the Appellant without trial court knowledge or approval as required by RSMo 211.183.6, RSMo 211.183.7, and RSMo 211.183.8 and the Adoption and Safe Families Act;

m) ceased all contact between the Appellant and her children, including visitation, written, and oral contact, without trial

court knowledge or approval and in violation of 13 CSR 40-73.075;

and the foster parents failed to inform the Appellant of her right to counsel in the termination of parental rights proceeding as required by RSMo 211.462.2.

AUTHORITY

Belton v. Board of Police Commissioners, 708 S.W.2d 131 (Mo.banc 1986)

Everson v. Board of Education, 330 U.S. 1 (1947)

Santosky v. Kramer, 455 U.S. 745 (1982)

Whisman v. Rinehart, 119 F.3d 1303 (8th Cir. 1997)

13 C.S.R. 40-30.010(2) (2003)

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Adoption and Safe Families Act, P.L. 105-89, (1997)

Constitution of Missouri, Article 5, Section 5

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Section 211.032.1 RSMo 2002

Section 211.183 RSMo 2002

Section 211.221 RSMo 2002

Section 211.462.2 RSMo 2002

United States Constitution, First, Fourth, and Fourteenth Amendments

3. The trial court erred in assuming jurisdiction, removing the children from the home without making reasonable efforts to prevent removal, and subsequently terminating the appellant's parental rights based on RSMo 211.183.1 because that statute is unconstitutionally void for vagueness and violates Article 1, Sections 2 and 10 of the Missouri Constitution and the Fourth and Fourteenth Amendments of the United States Constitution, in that the term "emergency" as used therein is not defined anywhere within the Revised Statutes of Missouri or the Code of State Regulations, and fails to inform the appellant of the conditions constituting an emergency, thereby depriving the appellant of notice of the proscribed conditions or behavior that placed her children at risk

for removal from the home and allowing for arbitrary and discriminatory enforcement.

AUTHORITY

Brokaw v. Mercer County, 235 F.3d 1000 (2001)

Cocktail Fortune v. Supervisor, Liquor Control, 994 S.W.2d 955 (Mo.banc 1999)

M.L.B. v. S.L.J., 519 U.S. 102 (1966)

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Constitution of Missouri, Article 1, Sections 2 and 10

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Section 211.031.1 RSMo 2002

Section 211.183.1 RSMo 2002

United States Constitution, Fourth and Fourteenth Amendments

Webster's Encyclopedic Unabridged Dictionary of the English Language, 1994 Ed., Page 467

4. The trial court erred in terminating the appellant's parental rights based upon the evidence because the evidence presented did not rise to the standard necessary to terminate parental rights, in that the petitioner failed to show by clear, cogent and convincing evidence that:

a) the appellant abandoned the children;

b) the appellant abused or neglected the children;

c) the children had been under the jurisdiction of the juvenile court for a period of one year, and the conditions which led to the assumption of jurisdiction still persisted, or conditions of a potentially harmful nature continued to exist;

d) termination was in the best interests of the children.

AUTHORITY

Anglim v. Missouri Pac.R.R. Co., 832 S.W.2d 298 (Mo.banc 1992)

In Re B.C.K., 103 S.W.3d 319 (Mo.App.S.D. 2003)

In the Interest of C.N.G., WD 62428 (Mo.App.W.D. 2003)

Adoption and Safe Families Act, PL 105-89

Section 167.031.1 RSMo 2002

Section 211.031 RSMo 2002

Section 211.183 RSMo 2002

Section 211.447 RSMo 2002

ARGUMENTS

POINT 1

The trial court erred in terminating the appellant's parental rights based on RSMo 211.447.2(1) because that statute is unconstitutional, in that the time period of fifteen out of the most recent twenty-two months that a child remains in foster care as a *ground* for termination of parental rights is arbitrary, capricious, and violates Article 1, Sections 2 and 10 of the Missouri Constitution and the 14th Amendment of the United States Constitution by depriving the appellant of her liberty interest in the care, custody and management of her children without due process of law.

Standard of Review

The reviewing court will affirm the decision below unless there is no substantial evidence to support it, unless it is against the weight of the evidence, or unless it erroneously declares or applies the law. Murphy v. Carron, 536 S.W.2d 30, 32 (Mo. Banc 1976). Statutory interpretation is an issue of law that this Court reviews *de novo.* Blakely v. Blakely, 83 S.W.3d 537, 540 (Mo. banc 2002). Missouri courts start with the presumption that the statute is constitutional. Suffian v. Usher, 19 S.W.3d 130, 134 (Mo. banc 2000). It "will not be invalidated unless it 'clearly and undoubtedly'

violates some constitutional provision and 'palpably affronts fundamental law embodied in the constitution.'" Blakely v. Blakely, at 541.

The U.S. Supreme Court recognized that natural parents have a fundamental liberty interest in the care, custody, and management of their children in Santosky v. Kramer, 455 U.S. 745 (1982). The Supreme Court, in San Antonio Independent School District v. Rodriguez, 411 U.S. 1 (1973), stated, ". . . we apply 'strict judicial scrutiny' only when legislation may be said to have 'deprived,' 'infringed,' or 'interfered' with the free exercise of some such fundamental right or personal liberty." To apply the "strict scrutiny" standard of review, the Supreme Court has stated, "We have insisted not merely that the interest denominated as a 'liberty' be 'fundamental' . . . but also that it be an interest traditionally protected by our society." Lawrence v. Texas, 02-102, (U.S. 2003). See also In Re the Marriage of Woodson, 92 S.W.3d 780, 783 (Mo. banc 2003). Termination of parental rights is a state interference that infringes significantly upon a fundamental right, and a strict scrutiny standard applies when examining the constitutionality of a state statute that forever terminates those rights.

Argument

The issue before this Court is whether RSMo 211.447.2(1) is constitutional when the State uses that section of the statute as a ground for

termination of parental rights. Appellant suggests that the statute is constitutional as a *trigger* for the initiation of termination of parental rights proceedings; however, as a *ground* for termination, it is arbitrary, capricious, unconstitutional, and violates both the Missouri and United States Constitutions as a procedural and substantive denial of due process.

The Statute: RSMo 211.447.2(1)

RSMo 211.447.2(1) states as follows:

> "2. (1) Except as provided for in subsection 3 of this section, a petition to terminate the parental rights of the child's parent or parents shall be filed by the juvenile officer or the division, or if such a petition has been filed by another party, the juvenile officer or the division shall seek to be joined as a party to the petition, when:
>
> (1) Information available to the juvenile officer or the division establishes that the child has been in foster care for at least fifteen of the most recent twenty-two months;"

The statute clearly establishes that Missouri construes the fifteen of twenty-two month time frame as a *ground* for termination when RSMo 211.447.3 states:

> "3. If grounds exist for termination of parental rights pursuant to subsection 2 of this section, . . ."

The statute further establishes that the fifteen of twenty-two months in foster care time period is a ground for termination in RSMo 211.447.5 as follows:

> "5. The juvenile court may terminate the rights of a parent to a child upon a petition filed by the juvenile officer or the division, or in adoption cases, by a prospective parent, if the court finds that the termination is in the best interest of the child and when it appears by clear, cogent and convincing evidence that grounds exist for termination pursuant to subsection 2, 3, or 4 of this section."

The Federal Basis for RSMo 211.447

The Missouri statute is based upon the federal Adoption and Safe Families Act of 1997 (AFSA), P.L. 105-89, 111 Stat. 2115. The requirement to initiate or join proceedings to terminate parental rights is treated as a State plan requirement under section 103(c)(4) of AFSA.

AFSA merely requires states to use the fifteen of twenty-two months time frame as a prompt to initiate proceedings to terminate parental rights. The House and Senate debates of 1997 indicate the Legislature's desire to determine an appropriate time frame to begin permanency planning for children in foster care. (A 22 - 83) The time frame is referred to at one point as an "absolute trigger." (A 38). Fifteen of twenty-two months is a House-Senate compromise for establishment of this "trigger." Nowhere in the House or Senate debates, or in the text of AFSA, is there a reference to the time frame as a ground for termination. AFSA only requires that states *initiate* termination proceedings by filing a petition to terminate parental rights at a certain point, not that states terminate rights when the time frame is satisfied.

RSMo 211.447.2(1) as an Interference with Appellant's Constitutional Rights

Appellant has a fundamental liberty interest as a natural parent in the care, custody, and management of her children. It is a right protected by the Fourteenth Amendment of the United States Constitution and by Article 1, Sections 2 and 10 of the Missouri Constitution. Santosky v. Kramer, 455 U.S. 745, 753 (1982). Using a time frame as a ground for termination is a

significant state interference in the Appellant's fundamental liberty interest in raising her children, in maintaining her familial relationships, and is a denial of procedural and substantive due process.

RSMo 211.447.2(1) Violates Appellant's Substantive Due Process Rights

The Due Process Clause of the U.S. Constitution's 14th Amendment encompasses substantive rights of parents in the care, custody and control of their children. Troxel v. Granville, 530 U.S. 57, 65 (2000). An interest so fundamental as parental rights receives heightened protection against government interference. RSMo 211.447.2(1) is an extreme infringement upon appellant's substantive due process rights in that a time frame for which a child remains in foster care can be the sole ground which forever destroys the appellant's fundamental right to raise her children as she sees fit. As a ground for termination, RSMo 211.447.2(1) provides no protection for the appellant's right to substantive due process.

RSMo 211.447.2(1) Violates Appellant's Procedural Due Process Rights

It is clear that parents have a constitutional right to the care, custody and management of their children. RSMo 211.447.2(1) significantly impinges on that right and deprives the Appellant of her procedural due

process rights when the time frame of fifteen of twenty-two months in foster care is used as a ground to terminate her status as a mother. The statute assumes that during the fifteen of twenty-two month period:

1. the Appellant has received procedural due process protection from the juvenile court;
2. the Division of Family Services has made reasonable efforts to reunite the family; and
3. the Juvenile Officer has properly performed his or her job and has brought the matter before the juvenile court as required by RSMo Chapters 210, 211, and Supreme Court Rule 119.08.

As will be shown in this brief under other arguments, this is a dangerous and incorrect assumption.

Reliance upon an arbitrary and capricious time frame to forever terminate a parent's relationship with a child is a flagrant violation of procedural due process.

Strict Scrutiny Analysis of RSMo 211.447.2(1)

The statute fails under strict scrutiny analysis. Since the liberty interest in raising one's children is undisputedly a fundamental constitutional right traditionally protected under the Fourteenth Amendment of the U.S.

Constitution and Article 1, Sections 2 and 10 of the Missouri Constitution, the strict scrutiny analysis proceeds to determine whether the state's interest is compelling and whether the statute impinges upon the Appellant's personal right in the least restrictive manner.

Appellant acknowledges that the state has a compelling interest in placing children in permanent homes. In proceedings to terminate parental rights pursuant to RSMo 211.447, only one ground need be proven by clear, cogent, and convincing evidence. In the Interest of E.L.B., 103 S.W.3d 774, 776 (Mo. Banc 2003). Except for RSMo 211.447.2(1), all grounds enumerated within the statute are logically related to parental fitness or the lack thereof (abandonment, failure to remedy circumstances), or to affirmative acts by the parent which are harmful to the child or which have harmed others (abuse, neglect, murder, manslaughter, bodily injury, failure to support, mental illness, chemical dependency). There is no logical relationship between the length of time in foster care and the need to terminate parental rights. When that time frame is used as a stand-alone ground for termination by the state, it is arbitrary and capricious and unduly impinges upon the Appellant's constitutional rights.

POINT 2

The trial court erred in terminating the appellant's parental rights because the court failed to follow and failed to require all parties involved to follow mandatory procedures, thereby violating the appellant's procedural and substantive due process rights under Article 1, Sections 2 and 10 of the Missouri Constitution and the 4th and 14th Amendments of the United States Constitution, and her religious freedom guaranteed by the First Amendment of the United States Constitution and Article 1, Sections 5 and 7 of the Missouri Constitution, in that the trial court:

a) Improperly assumed jurisdiction of the children of the children pursuant to RSMo 211.183.1 because that statute is unconstitutional in that it does not define the term "emergency."

b) allowed the juvenile officer to remove the children from the home without making reasonable efforts to prevent removal, without the existence of emergency conditions, and without a court order, in violation of the Adoption and Safe Families Act, RSMo 211.183.1, RSMo 211.183.5, and the Fourth Amendment of the United States Constitution;

c) failed to make findings as required by RSMo 211.183.3 and RSMo 211.183.5 in its Order of Protective Custody;

d) failed to give the appellant written notice of her right to a protective custody hearing as required by Supreme Court Rule 111.13(c) and RSMo 211.032.1;

e) failed to hold a dispositional review hearing within 12 months of the time the children were placed in foster care as required by Supreme Court Rule 119.08(a);

f) failed to hold a permanency hearing within 12 months of the time the children were placed in foster care as required by RSMo 210.720;

g) failed to make efforts to place the children in a foster home of the same religious faith as that of the birth family as required by RSMo 211.221;

h) failed to review the status of the children every six months as required by RSMo 210.730;

and the Division of Family Services:

i) failed to file a written status report on the children every 6 months following foster care placement as required by RSMo 210.720.1;

j) failed to develop a case plan for the children within thirty days as required by 13 CSR 40-30.010(2);

k) failed to develop a written service plan within 72 hours of placement and failed to evaluate the progress of the appellant and children every three months as required by 13 CSR 40-73.075;

l) ceased reasonable efforts to reunite the children with the Appellant without trial court knowledge or approval as required by RSMo 211.183.6, RSMo 211.183.7, and RSMo 211.183.8 and the Adoption and Safe Families Act;

m) ceased all contact between the Appellant and her children, including visitation, written, and oral contact, without trial court knowledge or approval and in violation of 13 CSR 40-73.075;

and the foster parents failed to inform the Appellant of her right to counsel in the termination of parental rights proceeding as required by RSMo 211.462.2.

Standard of Review

The reviewing court will affirm the decision below unless there is no substantial evidence to support it, unless it is against the weight of the evidence, or unless it erroneously declares or applies the law. Murphy v.

Carron, 536 S.W.2d 30, 32 (Mo. banc 1976). When a constitutionally protected interest is at stake in a termination of parental rights proceeding, the Court requires heightened procedural protections. Santosky v. Kramer, 455 U.S. 745, 761 (1982).

This Court uses a two-step analysis to determine whether the appellant was denied her constitutionally protected right to procedural due process. Belton v. Board of Police Commissioners, 708 S.W.2d 131 (Mo. Banc 1986). First, the Court determines whether an action by the state deprives the appellant of an interest protected by the Fourteenth Amendment. If so, the Court then determines whether the procedures followed are sufficient under the requirements of the Constitution. *Id.* at 136.

Argument

The appellant has a constitutionally protected liberty interest in the care, custody, and management of her children. Santosky v. Kramer, 455 U.S. 745 (1982). As such, the first prong of the heightened protection analysis for procedural due process violations is met. This Court must now determine whether the procedures afforded the appellant were constitutionally sufficient to protect her interests.

Appellant asserts that from the outset, the trial court, the Division of Family Services, and the foster parents failed to protect her procedural due

process rights. The following actions, or instances where there was a failure to act, collectively violated the appellant's rights to such an extent so as to shock the conscience.

The Trial Court Violated the Appellant's Procedural Due Process Rights

The trial court violated statutory due process requirements and the Rules of this Court. By ignoring the procedural requirements of the following provisions, the trial court deprived the appellant of her constitutionally protected liberty interest in the care, custody, and control of her children.

"'Severance of the parent-child relationship by act of law is an exercise of awesome power and demands strict and literal compliance with the statutory authority from which it is derived;' . . . compliance is mandatory." In the Interest of B.R.S., 937 S.W.2d 773, 774 (Mo.App. W.D. 1997), citing D.E.J. v. G.H.B., 609 S.W.2d 472, 474 (Mo.App. W.D. 1980).

a) The trial court improperly assumed jurisdiction of the children pursuant to RSMo 211.183.1 because that statute is unconstitutional in that it does not define the term "emergency."

The trial court authorized the sudden removal of the appellant's children from her home based upon "emergency conditions" that allegedly existed in the home at that time. (LF 13). Appellant asserts that the term "emergency" as used in the statute is constitutionally vague and that the statute is void for vagueness. A court may not assume jurisdiction based upon an unconstitutional statute, and rules or orders made in excess of a court's power are void. State ex rel. Geers v. Lasky, 449 S.W.2d 598, 600 (Mo.banc 1970). The assumption of jurisdiction and order to remove the children from the appellant's home was in excess of the court's authority, thus the Order was void. Appellant asserts that she has been denied the care and custody of her children since September 2, 1999 because the trial court acted in excess of its authority and as such, she was denied procedural due process.

Appellant refers the Court to the discussion of this matter under Number 3 of her Points Relied On with regard to that portion of the statute that the appellant alleges is unconstitutional.

b) The trial court allowed the juvenile officer to remove the children from the home without a court order, without making reasonable efforts to prevent removal, and without the existence

of emergency conditions, in violation of the Adoption and Safe Families Act, RSMo 211.183.1, RSMo 211.183.5, and the 4th Amendment of the United States Constitution.

The children were removed from the home on September 2, 1999. (Mother's A 28). The juvenile officer did not file her petition for custody until September 3, 1999 (LF 11). The trial court entered its Order of Protective Custody on September 3, 1999. (LF 13).

RSMo 211.183.1 allows the children to be removed from the home and eliminates the requirement that reasonable efforts be made by DFS to prevent removal when emergency conditions exist. However, the juvenile officer's petition did not allege that emergency conditions existed at the time the children were removed. (LF 11, 12). Reasonable efforts to prevent removal were not made.

The juvenile officer was without authority to remove the children without requiring DFS to make reasonable efforts to prevent removal pursuant to RSMo 211.183.1 and the Adoption and Safe Families Act (PL 105-89, and Section 101 Amendment, 1997). There was no indication that the children were in danger of imminent harm, nor did emergency conditions exist at the time of removal. The appellant was denied procedural due

process that was intended to eliminate the need for removal from the home or to shorten the time that appellant was deprived of custody of her children.

The juvenile officer is required to have a court order before removing children from the home. RSMo 211.183.5 states, in part:

> "5. Before a child may be removed from the parent, guardian, or custodian of the child *by order of a juvenile court, . . .*" (Emphasis added.)

The juvenile officer was without authority to remove the children from the appellant's home without a court order. This action by the juvenile officer is an unlawful seizure under the Fourth Amendment of the U.S. Constitution. Brokaw v. Mercer, 235 F.3d 1000 (7th Cir 2001), citing United States v. Mendenhall, 446 U.S. 544, 554 (1980).

The trial court was without authority to find emergency conditions in its order when those conditions were not pled. (LF 13). The trial court may not grant relief beyond what is requested in the pleadings. Keen v. Dismuke, 667 S.W.2d 452, 453 (Mo.App. S.D. 1984), citing Stickle v. Link, 511 S.W.2d 848, 856 (Mo. 1974). Rules or orders made in excess of a court's power are void. State ex rel. Geers v. Lasky, 449 S.W.2d 598 (Mo.banc 1970). The trial court's Order on September 3, 1999 authorizing

the removal of the children from appellant's home based upon emergency conditions which were not pled was void and deprived the appellant of her fundamental right to the care, custody, and control of her children.

c) The trial court failed to make findings as required by RSMo 211.183.3 and RSMo 211.183.5 in its Order of Protective Custody.

RSMo 211.183.3 states as follows:

> "3. In support of its determination of whether reasonable efforts have been made, the court ***shall*** enter findings, including a brief description of what preventive or reunification efforts were made and why further efforts could or could not have prevented or shortened the separation of the family." (Emphasis added.)

RSMo 211.183.5 states:

> "5. Before a child may be removed from the parent, guardian, or custodian of the child by order of a juvenile court, excluding commitments to the division of youth services, the court ***shall*** in its orders:
>
> (1) State whether removal of the child is necessary

to protect the child and the reasons therefor;

(2) Describe the services available to the family before removal of the child, including in-home services;

(3) Describe the efforts made to provide those services relevant to the needs of the family before the removal of the child;

(4) State why efforts made to provide family services did not prevent removal of the child; and

(5) State whether efforts made to prevent removal of the child were reasonable, based upon the needs of the family and child." (Emphasis added.)

The trial court's Order of Protective Custody does not make the required findings. (LF 13). The trial court erred in failing to make the findings required by the plain language of the statute.

d) The trial court failed to give the appellant written notice of her right to a protective custody hearing as required by Supreme Court Rule 111.13(c) and RSMo 211.032.1.

"The Supreme Court may establish rules relating to practice,

procedure and pleadings for all courts and administrative tribunals, which shall have the force and effect of law. . . ". (Mo. Const. Art. 5, Section 5). Rules or orders made in excess of a court's power are void. State ex rel. Geers v. Lasky, 449 S.W.2d 598 (Mo.banc 1970).

Supreme Court Rule 113.13(c) states:

> "c. If the juvenile is continued in protective custody pursuant to this Rule 111.13, the parties ***shall*** be given notice of their right to a protective custody hearing by the court. Such notice ***shall*** be given in writing." (Emphasis added.)

RSMo 211.032.1 states:

> "1. When a child or person seventeen years of age, alleged to be in need of care and treatment pursuant to subdivision (1) of subsection 1 of section 211.031, is taken into custody, the juvenile or family court ***shall*** notify the parties of the right to have a protective custody hearing. Such notification ***shall*** be in writing. (Emphasis added.)

The children were removed from the home on September 2, 1999. Neither the trial court nor the juvenile officer ever provided the appellant

with written notice of her right to a protective custody hearing. The first true hearing in which evidence of any kind was presented was a motions hearing on February 27, 2002, two and one-half years after the children were taken from the appellant. (LF3). The trial court is without authority to disregard the rules of this Court or the statutes of this State.

In Whisman v. Rinehart, 119 F.3d 1303 (8th Cir. 1997), the Court found that the juvenile's mother had a right to an adequate post-deprivation hearing, and found that a seventeen day delay after the child was taken into custody was not sufficiently prompt to afford the mother a due process hearing. The Court found that "When the state deprives parents and children of their right to familial integrity, even in an emergency situation, without a prior due process hearing, the state has the burden to initiate prompt judicial proceedings to provide a post deprivation hearing." *Id.* "In such a case, the state cannot be allowed to take action depriving individuals of a most basic and essential liberty interest which those uneducated and uninformed in legal intricacies may allow to go unchallenged for a long period of time." *Id.*

Lack of notice of her right to a post-deprivation protective custody hearing deprived the appellant of procedural due process protections.

e) The trial court failed to hold a dispositional review hearing within 12 months of the time the children were placed in foster care as required by Supreme Court Rule 119.08(a).

Supreme Court Rule 119.08(a) states:

> "a. When a juvenile has been placed in foster care by the court, the court ***shall*** hold a dispositional review hearing within twelve months next following the initial foster care placement and, if the juvenile remains in foster care, the court ***shall*** hold dispositional review hearings annually thereafter." (Emphasis added.)

The Comment to this rule states:

> "The initial dispositional review hearing required by this Rule 119.08 is sooner than that required by section 210.720, RSMo, and subsequent review hearings are consistent with these requirements. The hearings ***must*** be completed within the specified time periods. Earlier reviews are encouraged. These reviews are in addition to the review of reports

also required every six months by section 210.720, RSMo." (Emphasis added.)

Clearly, it is the intent of this Court that the lower courts follow the proscribed time periods and that they monitor the status of juvenile cases more frequently, if possible.

In the present case, the trial court failed to hold a hearing in the juvenile abuse and neglect case until February 27, 2002, over two and one-half years after the children were taken from the appellant. (LF 3). A letter from DFS dated July 17, 2001 in which the agency made the juvenile officer aware that no jurisdictional hearing had ever been held was the apparent prompt for the court action. (Mother's A at 130). Failure to hold mandatory review hearings violates procedural due process.

f) The trial court failed to hold a permanency hearing within 12 months of the time the children were placed in foster care as required by RSMo 210.720.1.

RSMo 210.720.1 states in part:

". . . every six months after the placement [in foster care], the foster family, group home, agency or child care institution with which the child is placed shall file

> with the court a written report on the status of the child. The court ***shall*** review the report and ***shall*** hold a permanency hearing within twelve months of initial placement and at least annually thereafter." (Emphasis added.)

A permanency hearing at 12 months is a requirement of the federal Adoption and Safe Families Act (PL 105-89). The Act was amended on November 19, 1997. The amendment changed the time requirement for permanency hearings from 18 months after the child is considered to have entered foster care, to 12 months, when the court is to review the cases under its jurisdiction. (42 U.S.C. 675(5)(C) and amendment Sec. 302 of PL 105-89 (1997)).

This Court developed the *Missouri Resource Guide for Best Practices in Child Abuse and Neglect Cases* in 2001 to incorporate the requirements of this Act and to advise juvenile courts of the integration of the Act, the state statutes, and this Court's Rules. The purpose of the *Best Practices Resource Guide* was to ensure compliance with the mandates of the federal Act. (Missouri Supreme Court Commission on Children's Justice, Final Report, June 2003). (A 85, 86).

The record shows that DFS filed its first report with the court on June 20, 2001. The court set the case for its first review hearing on September 7, 2001. (LF 1, 38). In the mean time, the foster parents filed their Petition for Adoption on July 30, 2001 (LF 208). The appellant never had an opportunity to challenge the allegations of abuse and neglect or to present her case to the court before the foster parents began their efforts to terminate her parental rights and adopt her children.

The docket entry for September 7, 2001 only indicates that an attorney was appointed for the appellant at that time, not that a review hearing was held. (LF 1). Finally, on February 5, 2002, the court set the first permanency hearing for February 11, 2002, but again, there is no indication in the record that a hearing was actually held. (LF2). On February 11, 2002, the court set a motions hearing. (LF 2). That motions hearing was held on February 27, 2002. (LF 3).

The trial court's disregard of the statutes of this State, the Adoption and Safe Families Act, and the *Missouri Resource Guide for Best Practices in Child Abuse and Neglect Cases*, all of which require respect for the appellant's constitutional rights, violated acceptable standards of procedural due process.

g) The trial court failed to make efforts to place the children in a foster home of the same religious faith as that of the birth family as required by RSMo 211.221.

RSMo 211.221 states:

> "In placing a child in or committing a child to the custody of an individual or of a private agency or institution the court ***shall*** whenever practicable select either a person, or an agency or institution governed by persons of the same religious faith as that of the parents of such child, or in the case of a difference in the religious faith of the parents, then of the religious faith of the child or if the religious faith of the child is not ascertainable, then of the faith of either of the parents." (Emphasis added.)

"The 'establishment of religion clause' means at least this: Neither a state nor the Federal Government can set up a church. . . . Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion." Everson v. Board of Education, 330 U.S. 1, 15 (1947).

The appellant is of the Apostolic faith and has raised all of her nine children in that belief. (TR 774). Raising her children in that faith is of extreme importance to the appellant. (TR 776). DFS was well aware of the importance of religion and the outward expressions of that religion in the appellant's life and the lives of her children. (TR 263, 435, 436). In spite of this knowledge, DFS placed the children in the home of foster parents whose religion was substantially different from that of the appellant and her children. (TR 461). Further, the agency condoned the foster parents' actions that eliminated those outward expressions of the appellant's religion that she had instilled in her children. (TR 435, 436, 775; Mother's A at 85). DFS went so far as to prohibit the appellant from visiting the foster parents' church when the appellant had concerns about the religious differences and the faith in which her children were being raised. (TR 776, 777 and Mother's A at 227).

The trial court is charged with the responsibility of ensuring the continuity of religious freedom when placing a child in foster care. RSMo 211.221. In this, the trial court failed. The State, through the trial court and the Division of Family Services, obliterated the appellant's right to choose her children's religious upbringing. That authority was given to the foster parents, who did not have legal authority over these children. The court

sanctioned the Division of Family Services' and the foster parents' intentional interference in the appellant's constitutional right to raise her children according to her chosen beliefs in direct violation of the Constitutions of the United States and the State of Missouri.

h) The trial court failed to review the status of the children every six months as required by RSMo 210.730.

RSMo 210.730 states as follows:

> "The court shall possess continuing jurisdiction in proceedings under sections 210.700 to 210.760 and, in the case of children who are continued under foster care, ***shall*** review the status of the child whenever it deems necessary or desirable, but at least once every six months." (Emphasis added.)

The record does not indicate that the trial court ever reviewed the status of this case until April 17, 2001 when the first Children's Service Case Plan was filed. (LF 1). The appellant was denied custody of her children for years without ever having a judicial determination as to the validity of that deprivation.

This Court created the Commission on Children's Justice in January, 2003. In its final report, the Commission recommended mandatory status

conferences within three business days of the time children were removed from their homes, and mandatory hearings beginning at sixty days after removal. (Final Report, June 2003 at 27). (A 87-91). State and federal policy, as reflected in this report, favors procedural protections and reunification. Policy and procedure failed in the appellant's case, depriving her of one of the most basic liberty interests . . . the sacred relationship between mother and child.

The Division of Family Services Violated the Appellant's Procedural Due Process Rights

i) The Division of Family Services failed to petition for a status review within 6 months of the time the children were placed into foster care as required by RSMo 210.720.1.

RSMo 210.720.1 states in part:

"1. In the case of a child . . . who has been placed in foster care by a court, every six months after the placement, the foster family, group home, agency, or child care institution with which the child is placed ***shall*** file with the court a written report on the status of the child." (Emphasis added.)

DFS failed to file a status report on the children until April 17, 2001, when the first Children's Services Case Plan was filed, one year and seven months after the children were taken from the appellant. (LF 1).

The agency had numerous contacts with the appellant during this time and the appellant was actively attempting to comply with the DFS requirements for the return of her children. (Mother's A pages 33 through 89.) The agency is without discretion to ignore statutory requirements that are designed to protect the appellant's procedural due process rights.

The agency's failure to follow statutory requirements for prompting the court to hold hearings upon the status of the child is an inexcusable denial of the appellant's right to the custody of her children.

j) The Division of Family Services failed to develop a case plan for the children within thirty days as required by 13 CSR 40-30.010(2).

13 CSR 40-30.010 requires a case plan for every child in the custody of the Division of Family Services. Section (2) states:

"(2) Every case plan must be developed within thirty (30) days from the date if [it] has been determined a child should receive protective services or from the date that

a judicial determination has been made that the child should be placed in the care and custody of the division. Thereafter, each case plan shall be reviewed and modified, as necessary, every six (6) months. The purpose of the review is to determine the extent of compliance with the case plan and determine what changes, if any, should be made."

The children were taken from the appellant's home on September 2, 1999. (Mother's A at 29). DFS's first case plan was prepared September 15, 2000. (Mother's A at 61). In neglecting to follow its own rules, the agency unreasonably deprived the appellant of her liberty interest in the custody of her children and violated her constitutional right to due process.

k) The Division of Family Services failed to develop a written service plan within 72 hours of placement and failed to evaluate the progress of the appellant and children every three months as required by 13 CSR 40-73.075(1)(C),(D), (E), and (2)(A).

The Division is required to develop a written service plan for the family in order to facilitate the return of the children to the family home.

Relevant portions of 13 CSR 40-73.075 are set forth below:

"(1) Placement Records.

. . .

(C) A Preliminary written service plan ***must*** be developed and documented in the child's record within seventy-two (72) hours of admission.

(D) If the child remains in care beyond an initial thirty (30)-day plan, the written service plan ***must*** be modified to indicate the need for continued placement.

(2) Service Plan.

(A) The progress of a child and his/her family ***shall*** be evaluated at least every three (3) months, and the service plan ***shall*** be modified when appropriate.. . ." (Emphasis added).

DFS prepared the first Written Service Agreement setting forth the Requirements that the appellant must meet before her children could be returned on September 15, 2000. (Mother's A at 67). Without a Written Service Agreement, the appellant cannot know what she must do to effectuate the return of her children to her care. In neglecting to follow agency rules, DFS unreasonably deprived the appellant of her liberty interest

in the custody of her children and violated her constitutional right to due process.

l) The Division of Family Services ceased reasonable efforts to reunite the children with the appellant without trial court knowledge or approval as required by RSMo 211.183.6, RSMo 211.183.7, and RSMo 211.183.8 and the Adoption and Safe Families Act.

Relevant portions of RSMo 211.183 are set forth below:

"2. 'Reasonable efforts' means the exercise of reasonable diligence and care by the division to utilize all available services related to meeting the needs of the juvenile and the family. In determining reasonable efforts to be made and in making such reasonable efforts, the child's present and ongoing health and safety shall be the paramount consideration.

6. If continuation of reasonable efforts, as described in this section, is determined by the division to be inconsistent with establishing a permanent placement for the child, the division ***shall*** take such steps as are deemed necessary

by the division, including seeking modification of any court order to modify the permanency plan for the child.

7. The division shall not be required to make reasonable efforts, as defined in this section, but has the discretion to make reasonable efforts ***if a court of competent jurisdiction has determined that***:

   (1) The parent has subjected the child to a severe act or recurrent acts of physical, emotional or sexual abuse toward the child, including an act of incest; or . . .

8. ***If the court determines*** that reasonable efforts, as described in this section, are not required to be made by the division, the court shall hold a permanency hearing within thirty days after the court has made such determination. The division shall complete whatever steps are necessary to finalize the permanent placement of the child." (Emphasis added.)

The trial court never held a hearing and never determined that the appellant had subjected the children to a severe act or recurrent acts of physical, emotional or sexual abuse which would have relieved DFS of the requirements to make reasonable efforts to reunite the children with the

appellant. That determination was not made until the court issued its order terminating parental rights. (LF 138).

The Adoption and Safe Families Act (PL 105-89 and 42 U.S.C. 671(a)(15) requires that reasonable efforts be made to preserve and reunify families prior to the placement of a child in foster care to prevent or eliminate the need for removing the child or to make it possible for a child to safely return to the child's home. Not only did DFS fail to comply with these provisions, the agency failed to comply with RSMo 211.183 seeking court approval before eliminating reasonable efforts to reunite the children with the appellant. The DFS worker acknowledged that the agency failed to seek a court order modifying the permanency plan. (TR 434). The worker also acknowledged that it is DFS policy to pursue reunification until the agency receives a court order to cease reasonable efforts. (TR 438, 439).

The agency acted beyond its authority in failing to follow the statutory mandates of RSMo 211.183 and the Adoption and Safe Families Act. In so doing, the agency deprived the appellant of her constitutional right to procedural due process and the care, custody, and control of her children.

k) The Division of Family Services ceased all contact between the appellant and her children, including visitation, written, and

oral contact, without trial court knowledge or approval and in violation of 13 CSR 40-73.075.

The agency, without authority, severed all contact between the appellant and her children after February 13, 2001, in spite of appellant's numerous requests. (TR 769, 770, Mother's Exhibit T referencing copies of letters contained in Mother's A). The agency also prohibited her from having any children in her home, including visiting grandchildren. (Mother's A at 72). This was six months before the first docket entry was made on August 16, 2001. (LF 1). The record reflects the Division of Family Services' ongoing and blatant disregard for the appellant's constitutional liberty interest in the care, custody, and familial relationship with her children and for her procedural due process protections.

The Foster Parents Violated the Appellant's Procedural Due Process Rights

k) The foster parents failed to inform the appellant of her right to counsel in the termination of parental rights proceeding as required by RSMo 211.462.2.

RSMo 211.462 states:

"1. In all actions to terminate parental rights, . . .

2. The parent or guardian of the person of the child ***shall*** be notified of the right to have counsel, and if they request counsel and are financially unable to employ counsel, counsel ***shall*** be appointed by the court. ***Notice of this provision shall be contained in the summons. . . ."***

(Emphasis added.)

Failure to provide the required notice of the right to counsel in the summons in a termination of parental rights proceeding is a denial of due process. B.L.E. v. Elmore, 723 S.W.2d 917, 920 (Mo.App. W.D. 1987).

The foster parents filed their action to terminate appellant's parental rights and to adopt the appellant's children on July 30, 2001, in spite of the fact that in the underlying juvenile case, the court never adjudicated the appellant's alleged abuse and neglect. (LF 1, 208, 212). The summons, issued on July 31, 2001, did not contain notice of the right to counsel as required by RSMo 211.462.2. (LF 217).

Counsel was appointed for the appellant in the underlying juvenile case on September 7, 2001. (LF 1). On October 9, 2001, that same counsel entered her appearance in the foster parents' termination and adoption case. (LF 209). The two cases were consolidated on June 27, 2002. (LF 4).

It is true that the appellant was not harmed by this due process violation since her counsel in the juvenile abuse and neglect case was aware of the collateral termination and adoption case. However, this does not excuse the foster parents' failure to follow required statutory procedure. The appellant is entitled to due process notice of her rights, and the foster parents are obligated to follow those statutory requirements that protect the appellant's constitutional rights.

Procedural Due Process Analysis

Having established that the appellant has a constitutionally protected liberty interest at stake, the Court must determine what process is due to protect that interest and whether the procedures provided were sufficient under the Constitution. Belton, at 136.

As set forth above, the due process procedures provided to the appellant were grossly insufficient. Her children were removed from her home on September 2, 1999 without court order. Other than an appearance by the appellant before the juvenile court on September 7, 2001 at which time counsel was appointed for her, the appellant had no opportunity to be heard until January 24, 2002 in the foster parents' termination of parental rights hearing. (LF 1, LF 210).

Public policy and the Constitutions of this State and of the United States dictate that state courts and state agencies maintain procedures and protocol sufficient to protect the procedural due process rights of the citizens. Complete disregard for mandatory procedural safeguards when parental rights are at stake is in direct opposition to public policy and violates state and federal Constitutions.

In the appellant's case, the court, the Division of Family Services, and the foster parents collectively violated the appellant's constitutional due process rights and her right to choose her children's religious upbringing. The trial court erred in terminating parental rights when the parties repeatedly violated procedural due process protections and constitutional religious freedom protections, creating a situation in which the appellant was bound to fail. The culmination of these due process and religious freedom violations by the court, by DFS, and by the foster parents resulted in manifest injustice for the appellant when the court forever terminated her parental rights.

POINT 3

The trial court erred in assuming jurisdiction, removing the children from the home without making reasonable efforts to prevent removal, and subsequently terminating the appellant's parental rights based on RSMo 211.183.1 because that statute is unconstitutionally void for vagueness and violates Article 1, Sections 2 and 10 of the Missouri Constitution and the Fourth and Fourteenth Amendments of the United States Constitution, in that the term "emergency" as used therein is not defined anywhere within the Revised Statutes of Missouri or the Code of State Regulations, and fails to inform the appellant of the conditions constituting an emergency, thereby depriving the appellant of notice of the proscribed conditions or behavior that placed her children at risk for removal from the home and allowing for arbitrary and discriminatory enforcement.

Standard of Review

The reviewing court will affirm the decision below unless there is no substantial evidence to support it, unless it is against the weight of the evidence, or unless it erroneously declares or applies the law. Murphy v. Carron, 536 S.W.2d 30, 32 (Mo. Banc 1976). Statutory interpretation is an

issue of law that this Court reviews *de novo.* Blakely v. Blakely, 83 S.W.3d 537, 540 (Mo. banc 2002). Missouri courts start with the presumption that the statute is constitutional. Suffian v. Usher, 19 S.W.3d 130, 134 (Mo. banc 2000). An enactment is void for vagueness under the Due Process clause if its prohibitions are not clearly defined. Grayned v. City of Rockford, 408 U.S. 104, 109 (1972). The void for vagueness doctrine ensures that laws give fair and adequate notice of proscribed conduct and protects against arbitrary and discriminatory enforcement. Cocktail Fortune v. Supervisor, Liquor Control, 994 S.W.2d 955, 957 (Mo.banc 1999). The test in enforcing the doctrine is whether the language conveys to a person of ordinary intelligence a sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices. *Id.* at 957.

"Courts employ greater tolerance of enactments with civil rather than criminal penalties, because the consequences of imprecision are qualitatively less severe. Cocktail Fortune v. Supervisor, Liquor Control, *Id.* at 957. However, the Supreme Court in M.L.B. v. S.L.J., 519 U.S. 102, 124 (1996) compared the loss suffered by an appellant in a termination of parental rights case to the severity of consequences in criminal and quasi-criminal cases, and held that because of the permanent nature of a parent's loss, termination

cases would be classed with those limited types of cases which required equal access to the appeal process, thereby assuring heightened due process protection.

The Appellant urges this Court to hold RSMo 211.183.1 to the same high standard of clarity in statutory construction as those enactments that impose criminal penalties.

Argument

Appellant challenges the constitutionality of RSMo 211.183.1 as being void for vagueness and a violation of her due process rights under the United States and Missouri Constitutions.

The statute states, in part:

> "1. . . . If the first contact with the family occurred during an *emergency* in which the child could not safely remain at home even with reasonable in-home services, the division shall be deemed to have made reasonable efforts to prevent or eliminate the need for removal." (Emphasis added).

On September 3, 1999, the Juvenile Officer filed her Petition pursuant to RSMo 211.031.1, requesting a court order placing the children in the

custody of the court and the Division of Family Services, and alleging the following conditions:

> "The children have suffered from chronic head lice which has resulted in them missing numerous days of school, to the point that Georgeanne is two years behind." (Note: Georgeanne is not a subject in this appeal.) "The home is below minimal standards as there are soiled clothes and dirty dishes piled in the floor. There is food on the carpet and filth throughout the home. The biological mother does not follow through with medical treatment for the children." (LF 11).

The children were removed from the Appellant's home and placed in foster care upon an ex parte order issued by the trial court, finding the following:

> ". . . and it is established that an emergency situation exists and reasonable efforts to prevent the placement of the child was not made but the agency is now making efforts to return the child to the home. It further appears that said child should be detained under the custody of this Court and the Division

of Family Services at a suitable placement." (LF 13)

The trial court does not cite RSMo 211.183 as authority for this "emergency" removal of the children from the home; however, the court's order tracks the language of the statute. On November 21, 2002 judgment terminating the appellant's parental rights, the court referred to the "conditions which led to the assumption of jurisdiction" that "still persist" as a ground for termination. (LF 139)

The Term "Emergency" in RSMo 211.183.1 is Constitutionally Vague

Appellant asserts that the term "emergency" in RSMo 211.183.1 is so vague that it fails to apprise her of the conditions that placed her children at risk of being removed from her home suddenly and without warning by state workers. Appellant further asserts that the term "emergency" as used in RSMo 211.183.1 is so vague that it allows arbitrary and discriminatory enforcement by state workers. When Appellant's children were forcibly removed under the guise of "emergency" conditions without notice of what conditions constitute an emergency, the Appellant was denied her fundamental liberty interest in familial relations without due process of law.

The Supreme Court, in Papachristou v. City of Jacksonville, 405 U.S. 156, 162 (1972), found a city ordinance prohibiting vagrancy impermissibly vague because the ordinance failed to give fair notice that certain conduct was forbidden by statute and because it encouraged arbitrary and erratic arrests and convictions. The Court noted that police are allowed to make arrests only upon a showing of probable cause under a Fourth and Fourteenth Amendment standard, but that the vagueness of the ordinance in question permitted arrests based upon suspicion or investigation. *Id.* at 169. By analogy, the vagueness of RSMo 211.183.1 allows each juvenile officer to establish his or her own definition of "emergency" and deprives the Appellant and others of custody of their children based upon the individual juvenile officer's view of what conditions constitute an emergency situation. This unfettered discretion undoubtedly results in inequality and injustice for the poor, since in the Appellant's case, poverty contributed to the conditions that resulted in the unexpected removal of her children from her home.

The term "emergency" is subject to many interpretations. It is true that a statute is not unconstitutionally vague simply because a term is subject to different interpretations; however, when something as fundamental as a parent's right to custody of her child is at stake, the statute in question must explicitly define what conditions allow the state to infringe upon that right.

Webster's Dictionary defines "emergency" as "a sudden, urgent, usually unforeseen occurrence or occasion requiring immediate action." (Webster's Encyclopedic Unabridged Dictionary of the English Language, 1994 Edition, Pg. 467.) Black's Law Dictionary defines "emergency" as "a sudden unexpected happening; an unforeseen occurrence or condition; perplexing contingency or complication of circumstances; a sudden or unexpected occasion for action; exigency; pressing necessity. Emergency is an unforeseen combination of circumstances that calls for immediate action without time for full deliberation." (Sixth Edition, Pg. 522). The Missouri Supreme Court Commission on Children's Justice refers to emergency circumstances as those involving "severe or threatened harm." (Final Report, June 2003 at 22). (A 89). In the Appellant's case, the juvenile officer considered chronic headlice, dirty dishes and clothes, and general filth an emergency situation that allowed for forcible removal of the children from the home without requiring reasonable efforts to be made to prevent that traumatic extrication.

In a 42 U.S.C. Section 1983 claim, the 7th Circuit discussed a child's removal from his home by state and county workers under a Fourth Amendment unreasonable seizure analysis. Brokaw v. Mercer County, 235 F.3d 1000 (2001). The Court found that in the context of removing a child

from his home and family, ". . . a seizure is reasonable if it is pursuant to a court order, if it is supported by probable cause, or if it is justified by exigent circumstances, meaning that state officers 'have reason to believe that life or limb is in immediate jeopardy.'" In the present case, the juvenile officer removed the children from the home at 2:30 p.m. on September 2, 1999 (prior to seeking a court order on September 3, 1999) and based upon her own interpretation of what constituted an "emergency." (Mother's Exhibit A pages 29 and 33).

The DFS worker testified that she "warned" the appellant that the children would be removed unless the home and surroundings were cleaned up, but there was no mention of this or any other warnings in her detailed notes. (TR 251-254, 269-270, Mother's A at 1 through 76).

Under RSMo 211.183.1, a natural parent risks the extraordinary penalty of losing custody of her children based upon vague criteria that does not give fair and adequate notice of what constitutes an emergency. Because of this impermissible vagueness, and because without definition, individual state workers holding the power of child custody in their discretion and who have differing personal definitions of "emergency," inconsistent, arbitrary and discriminatory enforcement is inevitable. The statute is constitutionally vague and defective when the term "emergency" is undefined.

POINT 4

The trial court erred in terminating the appellant's parental rights based upon the evidence because the evidence presented did not rise to the standard necessary to terminate parental rights, in that the petitioner failed to show by clear, cogent and convincing evidence that:

e) the appellant abandoned the children;

f) the appellant abused or neglected the children;

g) the children had been under the jurisdiction of the juvenile court for a period of one year, and the conditions which led to the assumption of jurisdiction still persisted, or conditions of a potentially harmful nature continued to exist;

h) termination was in the best interests of the children.

Standard of Review

Termination of parental rights requires a two-step analysis. First, the court must find by clear, cogent, and convincing evidence that a statutory ground for termination exists pursuant to RSMo 211.447.5. In Re M.O., 70 S.W.3d 579, 584 (Mo.App. W.D. 2002). Whether statutory grounds have been proven by clear, cogent and convincing evidence is reviewed under the standard set forth in Murphy v. Carron, 536 S.W.2d 30, 32 (Mo.banc 1976).

The trial court's order will be affirmed unless no substantial evidence supports it, it is contrary to the weight of the evidence, or it erroneously declares or applies the law. *Id.*

After determining that statutory grounds have been proven by clear, cogent and convincing evidence, the court then considers the question of whether termination is in the best interests of the child pursuant to an abuse of discretion standard. In Re M.O. at 585.

Argument

As set forth in Point 1 of this brief, the appellant does not dispute the fact that her children have been in foster care for at least fifteen of the most recent twenty-two months, and that under present Missouri law, this fact alone is a ground for termination of her parental rights. Appellant refers the Court to that argument suggesting that termination on this ground is unconstitutional, arbitrary, and capricious.

Grounds for Termination Under RSMo 211.447.4

"The juvenile officer or the division may file a petition to terminate the parental rights of the child's parent when it appears that one or more of the following grounds for termination exist:" RSMo 211.447.4.

"(1) The child has been abandoned. . . The court shall find that the child has been abandoned if, for a period of six months or longer:

(b) The parent has, without good cause, left the child without any provision for parental support and without making arrangements to visit or communicate with the child, although able to do so;" RSMo 211.447.4 (1)(b).

The court found that appellant had, without good cause, left the children without any provision for parental support. (LF 136).

The appellant is the 47-year-old mother of nine children. She graduated from high school in 1973, worked three months as a nurse aide after graduation, married, and until DFS required her to become employed in 1999, remained at home for 26 years raising her family. (TR 247, 712, 713). After her children were removed, she worked from November 1999 until October of 2000. (TR 713).

Prior to the time the children were taken, the appellant's disabled husband contributed minimally to the support of the family. Two adults and six children lived on less than $1,000.00 per month from his income and welfare checks. (TR 713). DFS required the appellant to remove her husband from the home as a condition for the return of her children in

September 2000. (Petitioner's Exhibit #15, TR 718). Appellant was unemployed, without financial support from her husband and raising five children alone in a three-bedroom mobile home. (TR 247).

DFS further required that the appellant divorce her husband in order to secure the return of the children, knowing that this was against the appellant's religious beliefs. (Petitioner's Exhibit #16, Mother's Exhibit A at 15, TR 262, 263).

The appellant's child support order was entered in July 2001. (Petitioner's Exhibit #1). Appellant's last employment date was October 2000. She had been unemployed since that time, although she attempted to find work. (TR 758). The Division of Family Services refused to allow her to work at the job she knew best – providing childcare for children. (Mother's Exhibit A at 19). When she received her first temporary disability check, she paid one month's support in March 2002. (Petitioner's Exhibit #1A). Appellant was unable to pay support to the state because she had no income, not because she was unwilling. (TR 805, 806). Appellant had good cause for not paying child support to the state.

The court found that the appellant had abandoned the children because she, without good cause, did not make arrangements to visit or communicate with the children although able to do so. (LF 136, 137).

The appellant's last contact with her children was February 13, 2001. (TR 769, 770). The record contains evidence of multiple attempts by the appellant to visit or communicate with her children. (TR 770 – 773; Mother's Exhibit T summarizing page numbers in Mother's Exhibit A showing written requests for visits). DFS refused visitation unless the appellant met with the social worker at her office. (Petitioner's Exhibit #20). In desperation, the appellant placed a small classified ad in the local newspapers attempting to communicate with the children. (Mother's A at 245, TR 773). When the appellant expressed concern over the foster parents' religious upbringing of the children and attended a service at the children's church, she was reprimanded for doing so in spite of the fact that she did not see the children while at the church. (Mother's A at 227).

The appellant wrote letters to her children but the letters were not delivered. (Mother's Exhibit A at 339, 342, 347, 348, 349, 350). The therapist, Barbara Logan Thompson, determined that these communications were "psychologically damaging" to the children and should not be passed along. (Mother's Exhibit A at 338, 340, 343, 344, 345, 346, 351; TR 508-

510, TR 513, TR 523-527). It should be noted that Ms. Thompson began seeing the children in January, 2002, almost one year after DFS eliminated contact between the appellant and her children. (TR 518).

It cannot be said that the appellant intentionally abandoned her children. DFS prohibited her from contacting the children, even though the juvenile court never issued a no-contact order.

"(2) The child has been abused or neglected. In determining whether to terminate parental rights pursuant to this subdivision, the court shall consider and make findings on the following conditions or acts of the parent:" RSMo 211.447.4(2).

The trial court found clear, cogent, and convincing evidence that the appellant had abused and neglected the children because: (LF 137).

1. The medical needs of P.L.O. and S.K.O. were neglected by the appellant. (LF 137).

The minor child P.L.O. suffered an eye injury that subsequently led to blindness in her right eye. The appellant testified that the eye injury occurred in her absence on August 28, 1996. (TR 740). The appellant presented hospital records showing a visit to the emergency room for that

child on that date for the specific purpose of examining the child's eye. (Mother's Exhibit A at 395). The appellant testified and the exhibit shows that the injury was diagnosed as "pink-eye" or "conjunctivitis." The appellant treated the eye as directed by the physician. (TR 742). One year later, when the child experienced an onset of additional problems with the eye, the appellant followed up with an eye specialist. (TR 743, Mother's Exhibit A at 396). A recommendation was made at that time for follow up with a specialist in Kansas City; however, appellant testified that her transportation was unreliable and she was unable to make arrangements to get the child to Kansas City. (TR 744 – 747). DFS refused to allow Father to transport the appellant and the child to Kansas City for evaluation. (TR 607-608, 746). The DFS worker assisted in this matter but failed to follow through. (Mother's Exhibit A at 45).

The record shows that the appellant obtained medical care for the children as needed prior to their removal from the home. (Mother's Exhibit A at 364, 365, and 412, summarizing medical records contained in Mother's A) The trial court erred in finding clear, cogent, and convincing evidence that the children's' medical needs were neglected by the appellant.

2. P.L.O. and S.K.O. had not received basic childhood immunizations. (LF 137).

The record shows that prior to removal of the children on September 2, 1999, the appellant obtained the children's first round of immunizations on August 24, 1999. (Mother's Exhibit A at 410 and 427). The appellant informed the Division of Family Services that she had obtained shots for the children. (Mother's A at 28). However, in each and every report to the court throughout the three-year history of this case, DFS continued to assert that the appellant had never obtained immunizations for the children even though the immunization records were readily available to the agency. (LF 19, 27, 54, 102, 223; TR 251, 252). Failure to obtain immunizations on the recommended schedule is not a ground for termination under RSMo 211.447.

3. P.L.O. and S.K.O. were not enrolled in school nor were they being homeschooled. (LF 138).

The trial court found that the children were not being properly educated at the time they were removed from the home. The trial court took judicial notice of RSMo 167.031.1, which sets forth the age requirements for compulsory school attendance. S.K.O.'s date of birth is November 24, 1992.

At the time the children were removed from the home, she was six years and nine months old. RSMo 167.031.1 does not require school attendance until the child is seven years old.

P.L.O. had severe emotional problems that the appellant attempted to address. Those problems would interfere with public school attendance and required special education. (Mother's Exhibit A at 404-406, 407-409, 411; TR 242-245, 250 and 727 - 729). The DFS social worker assisted with finding a special school for P.L.O. but failed to follow through. (Mother's Exhibit A at 16, 19, 23, 24, 26, and 27).

The trial court erred in finding clear, cogent, and convincing evidence of educational neglect. The appellant was not required by law to have S.K.O. enrolled in school because of her age. P.L.O. was not enrolled in public school because of a justifiable reliance upon DFS's promise to assist in locating a special school for the child. When DFS reneged in that promise, the court erred in holding the appellant responsible for DFS's failure. Further, educational neglect, if it existed, is not a ground for termination under RSMo 211.447.

4. The home was below community standards. (LF 138).

The trial court found that there was clear, cogent, and convincing evidence that the home was below community standards. (LF 138). The conditions cited by the trial court at the time parental rights were terminated are the same conditions listed in the juvenile officer's original petition for custody. (LF 11). No evidence was presented at trial to show that these conditions continued to exist at the time of trial.

Appellant presented evidence that the home conditions had changed substantially and that the home met community standards. (Mother's Exhibits B through O). The first DFS visit to the home's interior occurred September 28, 2001, over two years after the children were removed. (Mother's A at 143). At that time, the social worker found the home and yard substantially improved. *Id*.

The trial court erred in finding clear, cogent, and convincing evidence that the home was below minimum community standards at the time of trial.

5. The children have been found to be abused and neglected children pursuant to RSMo 211.031. (LF 138).

Contrary to the court's findings, the court never adjudicated the issue of abuse and neglect. (LF 1 – 8). The appellant never had the opportunity to contest the allegations of abuse or neglect in a court of law

prior to the termination of parental rights proceeding. The trial court erred in finding clear, cogent, and convincing evidence that the children were abused or neglected pursuant to RSMo 211.031.

Even if the court is found to have adjudicated the issue of appellant's neglect, there is no evidence that the appellant was unable to care for the children at the time of trial. The appellate court recently rejected the argument of the juvenile court that a mere finding of previous neglect is sufficient to support a termination of parental rights. In Re B.C.K., 103 S.W.3d 319, 328, (Mo.App. S.D. 2003). In the present case, the appellant, through a series of procedural due process violations, was denied the opportunity to prove her ability to care for the children at the time of trial. The trial court erred in terminating the appellant's parental rights based upon unproven allegations of past neglect.

The trial court, pursuant to RSMo 211.447.4(2), is required to make the following findings:

> **"(a) A mental condition which is shown . . .to be permanent or . . . . . renders the parent unable to knowingly provide the child the necessary care, custody and control;" RSMo 211.447.4(2)(a).**

The trial court found that no mental condition existed and the appellant agrees.

"(b) Chemical dependency which prevents the parent from consistently providing the necessary care, custody and control of the child . . .;" RSMo 211.447.4(2)(b).

The trial court found no chemical dependency and the appellant agrees.

"(c) A severe act or recurrent acts of physical, emotional or sexual abuse toward the child or any child in the family by the parent, including an act of incest, or by another under circumstances that indicate that the parent knew or should have known that such acts were being committed toward the child or any child in the family;" RSMo 211.447.4(2)(c).

The trial court found that there have been severe acts of physical abuse. (LF 138).

The trial court found that P.L.O.'s father threw a car part at the

child, injuring her eye, and that the appellant failed to seek medical attention. (LF 138). The issue of medical attention for the eye injury was addressed above.

No evidence was presented to corroborate the claim that the father was responsible for the injury. Even if he was, Petitioner presented no evidence showing that the appellant ever committed any severe acts of physical abuse upon the children. The trial court erred in finding clear, cogent, and convincing evidence that the appellant had committed severe acts of physical abuse pursuant to RSMo 211.447.4(2)(c).

No clear, cogent, and convincing evidence was presented to support the trial courts finding that the appellant knew or should have known of emotional or sexual abuse, nor was there sufficient evidence to support the allegations that such abuse occurred at all. Father allegedly molested an older child but was never charged with a crime. (Mother's A at 99). The appellant's statement that she was aware of "unfatherly touchings" was taken out of context. Appellant referred to seeing Father pinch Anna on the breast and that she discussed the matter with him. (TR 717 - 718). As to any "touchings" more serious in nature or with regards to any other children, no evidence was presented to support the court's findings that appellant knew or should have known of those occurrences. The evidence cited earlier

in this brief supports finding that appellant responded appropriately when the allegations were raised by G.O. in April 1997 by removing Father from the home, obtaining an order of child protection, restricting visitation, and attempting to keep Father from the home.

"(d) Repeated or continuous failure by the parent, although physically or financially able, to provide the child with adequate food, clothing, shelter, or education as defined by law, or other care and control necessary for the child's physical, mental, or emotional health and development;" RSMo 211.447.4(2)(d).

The trial court found that the appellant has repeatedly and continuously failed, although physically or financially able, to provide the children with adequate food, clothing, shelter, or education as defined by law, or other care and control necessary for the children's physical, mental or emotional health and development. (LF 139).

No evidence was presented regarding the appellant's failure to provide adequate food or clothing for the children while they were in her care. Shelter for the family was adequate although they lived in poverty. (Mother's A at 2). The only evidence presented at trial of insufficient

shelter was that the appellant, at the time of trial, had no electricity in her home because of her poverty. (TR 823).

The issue of education has been addressed previously. The appellant presented evidence of her efforts to provide medical care and mental health care for the children and those matters have been described above. (TR 244, 248, 249, 250). The appellant attempted to resolve the problem of headlice for years and did all that was possible short of cutting the children's hair in violation of her religious beliefs. (TR 239, 240, 720, 731, 775). The issue of financial support was addressed previously.

The trial court erred in finding clear, cogent, and convincing evidence that the appellant failed to provide adequate food, clothing, shelter, education, or other care necessary for the children's wellbeing at the time of trial.

"(3) The child has been under the jurisdiction of the juvenile court for a period of one year, and the court finds that the conditions which led to the assumption of jurisdiction still persist, or conditions of a potentially harmful nature continue to exist, that there is little likelihood that those conditions will be remedied at an early date so that the child can be returned to the parent in the near future, or the continuation of the

parent-child relationship greatly diminishes the child's prospects for early integration into a stable and permanent home. In determining whether to terminate parental rights under this subdivision, the court shall consider and make findings on the following:" RSMo 211.447.4(3).

1) The trial court found that the conditions which led to the assumption of jurisdiction still persisted. (LF 139).

The juvenile officer's petition dated September 3, 1999, alleged that the children suffered from chronic headlice, the home was below minimal standards because of soiled clothes and dirty dishes piled in the floor, food on the carpet, and filth throughout the home, and that the appellant did not follow through with medical treatment for the children. (LF 11, 12).

The petitioner presented no evidence establishing the fact that those conditions continued to exist at the time of trial. The appellant's home and surroundings were inspected on September 28, 2001 and found to be acceptable and much improved. No evidence was presented that established the appellant was afflicted with headlice at the time of trial, or that the children were, or if they were infested that the infestation was attributable to the appellant. No evidence was presented to establish that the appellant had the present opportunity to follow through with medical care for the children

but failed to do so, since the appellant has been denied contact with the children since February 13, 2001.

The trial court erred in finding clear, cogent, and convincing evidence that the conditions which led to the assumption of jurisdiction still persisted at the time of trial pursuant to RSMo 211.447.4(3).

2. The trial court found that there continue to be potentially harmful conditions existing at the time of trial. (LF 139).

The trial court found that the appellant was unable to provide a safe and appropriate home for the children at the time of trial since her home was without electricity, she had limited insight into problems, was inflexible in her thinking, and had not taken responsibility for her own actions. (LF 139).

The petitioner did not present evidence, and the trial court did not make findings, as to how these specific conditions would be harmful to the children. It is unclear from the trial court's ruling how any of these listed conditions are inherently dangerous to the children. The appellant acknowledged that it was preferable to have electricity in her home and testified to her efforts to restore those services. (TR 823, 824). She acknowledged her responsibility in the present situation. (TR 817, 828).

The court found that the appellant took no action to protect the

children from their father when she observed him touching one of the children in "unfatherly" ways. The evidence was overwhelmingly against the court's finding. The context of the appellant's statement is clarified in her testimony. (TR 608-610, 717, 819-820). She removed her husband from the home immediately after the sexual abuse allegations were made. (Mother's A at 2; TR 718). She obtained an order of protection for the children. (Mother's A at 3). She appropriately restricted visitation with the father. (Mother's A at 7). She agreed to DFS's demand that she divorce her husband in spite of the fact that divorce is against her religious beliefs and she took steps to accomplish that goal. (Mother's A at 15, Petitioner's Exhibit #14). She asked that the case against her husband be prosecuted. (Mother's A at 15). She tried to keep her husband away from the home. (Mother's A at 25; TR 719, 785 – 786; TR 237, 238, 241, 248). The therapist testified that the appellant was capable of protecting the children. (TR 55).

The trial court erred in finding clear, cogent and convincing evidence that harmful conditions continued to exist at the time of trial pursuant to RSMo 211.447.4(3).

The additional findings required by RSMo 211.447.4(3) are as follows:

"(a) The terms of a social service plan entered into by the parent and the division and the extent to which the parties have made progress in complying with those terms;" RSMo 211.447.4(3)(a).

The trial court found that the appellant failed to comply with the terms of the social service plans and had not made progress in complying with those plans.

The appellate court considered whether a parent's failure to comply with DFS's service agreements was a sufficient ground for termination of parental rights in In the Interest of C.N.G., WD 62428 (Mo.App. W.D. 2003). The appellate court emphasized that the trial court was mandated to focus on whether there was parental progress toward compliance with the service agreements, not whether compliance was full or substantial. Id.

In the present case, the trial court found that the appellant failed to make significant progress even though she complied with portions of the service agreements. (LF 140). The Division's written service agreements are set forth in Petitioner's Exhibit #15 and #16. There was no written service agreement for the appellant until September 15, 2000, one year after the children were removed. (Petitioner's Exhibit 15).

The appellant made valiant efforts to comply with the demands of DFS for the return of her children. The appellant participated in counseling with Jo Ann Hoy (Mother's A at 37, TR 750), attended parenting classes (Mother's Exhibit R and S), attended Al-Anon (Mother's Exhibit Q, TR 755), and participated in counseling with Patricia Heck (Petitioner's #12).

She continued to look for employment until the day of trial. (TR 758, 825). She attended visits regularly until DFS stopped all visitation. (TR 760 – 764, TR 766 – 769, TR 115 – 117). She attended classes at Lafayette House. (TR 833, TR 750 – 752). She cleaned up the home and the yard. (Mother's Exhibits B through O, Mother's Exhibit A at 143, TR 440, 456-457). She purchased car insurance. (TR 756, Mother's Exhibit #P).

The appellant testified that she did not meet monthly with the social worker because of a personality conflict, and that she did not know that she could request a different social worker. (TR 757, 758). However, she communicated in writing. (Mother's Exhibit #T, summarizing written contacts with DFS as provided in Mother's Exhibit A).

She paid child support when she was able; however, she was unemployed the better part of this case's history. (TR 759 – 760). She provided school supplies in lieu of cash. (TR 762). She provided clothing

and gifts. (TR 121, 122). When she was allowed to visit the children, she held birthday parties and holiday family gatherings. (TR 763, 130).

The appellant attempted to provide access to her home when she was working, but could not afford to take off work unless she was sure the DFS worker would be there. (TR 748 – 749). Regina Huffman, the last social worker, made unannounced visits and was not able to gain access to the home when the appellant was not present; however, she did gain access in September, 2001. (Mother's A at 143).

The appellant initiated divorce proceedings as required by DFS, in spite of her religious objections. (Petitioner's Exhibit #14, TR 238, 262, 263). She obtained a child protective order. She did not allow anyone else to live in her home with her, and maintained a drug and alcohol free home.

The trial court erred in finding clear, cogent, and convincing evidence that the appellant failed to comply and make progress with social service plans pursuant to RSMo 211.447.4(3)(a).

"(b) The success or failure of the efforts of the juvenile officer, the division or other agency to aid the parent on a continuing basis in adjusting his circumstances or conduct to provide a proper home for the child;" RSMo 211.447.4(3)(b).

The trial court found that the juvenile officer and the Division of Family Services failed in their efforts to aid the appellant on a continuing basis to provide a proper home for the children. Specifically, the court found that the appellant failed to make any progress in rectifying the conditions that caused the children to come into care and that she refused to cooperate and participate in the case plan. (LF 142). The court further found that the appellant's behaviors and choices were a pattern of lack of interest. (LF 142).

The evidence shows that the appellant made significant improvement in the conditions of the home and rectified the conditions that caused the children to come into care. (Mother's Exhibits B through O, Mother's A at 143, TR 456-457). The evidence also shows that the appellant consistently attempted to maintain contact with the children but she was thwarted in her efforts by DFS. Even when she was allowed visits with the children, the family was prohibited from whispering or having private conversations. (TR 129, 130).

The inability to access the children through no fault of her own cannot reasonably be construed as a lack of interest. The trial court erred in finding clear, cogent, and convincing evidence that appellant was responsible for the

agency's and the juvenile officer's failure to aid the appellant in providing a proper home for the children.

"(c) A mental condition which is shown by competent evidence either to be permanent . . . and which renders the parent unable to knowingly provide the child the necessary care, custody and control." RSMo 211.447.4(3)(c).

The trial court found that the appellant did not have a mental condition and the appellant agrees.

"(d) Chemical dependency which prevents the parent from consistently providing the necessary care, custody and control over the child. . ." RSMo 211.447.4(3)(d).

The trial court found that the appellant did not have a chemical dependency and the appellant agrees.

"**When considering whether to terminate the parent-child relationship pursuant to subsection 2 or 3 of this section or subdivision (1), (2), (3), or (4) of subsection 4 of this section, the court shall evaluate**

and make findings on the following factors, when appropriate and applicable to the case:" RSMo 211.447.6.

"(1) The emotional ties to the birth parent;" RSMo 211.447.6(1).

The trial court found that the children have emotional ties to the appellant, but those ties are not positive. (LF 142). The court found that the past treating therapist and the current therapist testified as to these ties. (LF 142). It should be noted that therapist Patricia Heck initiated a decrease in parental visits as early as April, 2000, seven months after the children were taken into care. (Mother's A at 322). She continued this effort to sever family ties into September, 2000, even though the children refused to admit that they preferred not to see their mother. (Mother's A at 325 – 327). In October, 2000, this same therapist noted that the girls were feeling pressured to give up visits with their mother. (Mother's A at 328).

The person referred to as the "current therapist," Barbara Logan Thompson, did not begin seeing the children until they had been denied contact with their mother for over one year. (Mother's A at 337). The children were using their new first and last names at this time (Mother's A at 103, 337, 340, 343, TR 443-445). DFS admitted being aware of the use of different names by the children and by the foster parents. (TR 443 – 445).

The children expressed their longing for their birth family in August, 2001, but that these expressions were summarily dismissed by DFS. (Mother's A at 132, TR 450 – 452).

The appellant asserts that if there are minimal emotional ties between the children and their mother, it is because of DFS's ongoing and deliberate efforts to sever those ties. As set forth elsewhere in this brief, the agency ceased all contact between the appellant and her children without a court order, ceased reasonable efforts to reunite the children without a court order, placed the children in a pre-adoptive home and allowed the foster parents to indoctrinate the children into a different religion and to begin using new first and last names for the children within one month of being placed there. The trial court erred in finding by clear, cogent and convincing evidence that there were negative emotional ties between the children and their mother, or that it was the appellant's acts that weakened the bonds.

"(2) The extent to which the parent has maintained regular visitation or other contact with the child;" RSMo 211.447.6(2).

The court found that the appellant had not maintained regular visitation or other contact with the children. (LF 142). As previously discussed, DFS prevented appellant's contact with the children after

February 13, 2001. The trial court erred in finding clear, cogent, and convincing evidence that the appellant failed to maintain contact with the children of her own volition.

"(3) The extent of payment by the parent for the cost of care and maintenance of the child when financially able to do so including the time that the child is in the custody of the division or other child-placing agency;" RSMo 211.447.6(3).

The court found that the appellant failed to pay for the cost of care when she was financially able to do so. (LF 142). The appellant paid one child support payment when she received her first temporary disability check. The appellant was unemployed the remainder of the time that this case was pending. Poverty is a significant issue in this case, but the appellant paid what she was able to pay. The court erred in finding clear, cogent, and convincing evidence that the appellant was able to pay for the cost of care but refused to do so.

"(4) Whether additional services would be likely to bring about lasting parental adjustment enabling a return of the child to the parent within an ascertainable period of time;" RSMo 211.447.6(4).

The court found that additional services would be unlikely to bring about a lasting parental adjustment enabling the return of the children to the appellant within an ascertainable period of time. (LF 142). The court made no specific findings on what additional services might be available and why those services would not allow the appellant to adjust. Without specific findings, the court cannot be said to have found clear, cogent, and convincing evidence of this factor.

"(5) The parent's disinterest in or lack of commitment to the child;" RSMo 211.447.6(5).

The court found that the appellant was disinterested in and lacked commitment to the children. (LF 143). The court did not make specific findings as to this factor. Therefore, the trial court cannot be said to have found by clear, cogent and convincing evidence that the appellant is disinterested in or lacks commitment to the children.

"(7) Deliberate acts of the parent or acts of another of which the parent knew or should have known that subjects the child to a substantial risk of physical or mental harm." RSMo 211.447.6(7).

The court found that the appellant committed deliberate acts that

subjected the children to substantial risk of physical or mental harm. (LF 143). The court found that she generally neglected the children; however, neglect, by its very nature, is not a deliberate act. Even if she committed deliberate neglect, parental rights cannot be terminated based upon a past instance of neglect. In Re B.C.K., at 328.

The court found that the appellant neglected medical treatment for the children. As discussed previously and as shown in the record, there is insufficient evidence to support the trial court's finding that the appellant neglected the children's medical treatment.

The court found that the appellant failed to educate the children. The issue of educational neglect has been previously addressed.

The court found that the appellant allowed lice infestations. No evidence was presented to show that this condition existed at the time of trial.

The court found that the appellant caused the children to live in filth. No evidence was presented to show that these conditions existed at the time of trial.

The trial court erred in finding clear, cogent, and convincing evidence that these conditions existed at the time of trial, that these were deliberate

acts of the appellant, or how these alleged conditions subjected the children to substantial risk of physical or mental harm.

Termination and the Best Interests of the Children

Before the trial court may terminate parental rights, it must find by clear, cogent, and convincing evidence that a statutory ground for termination exists pursuant to RSMo 211.447. In Re M.O., 70 S.W.3d 579, 584 (Mo.App.W.D. 2002). Only after that determination is made does the question of the child's best interests arise. *Id.* Even if the court finds grounds to terminate, the court can still deny termination if the court does not believe termination to be in the best interest of the child. *Id.* at 585. The decision to terminate based upon the best interests of the child is reviewed on the abuse of discretion standard, i.e., whether the ruling is "clearly against the logic of the circumstances then before the court and is so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration." *Id.* at 585, citing Anglim v. Missouri Pac. R.R. Co., 832 S.W.2d 298, 303 (Mo.banc 1992).

Appellant asserts that the petitioner has not proven grounds for termination by clear, cogent, and convincing evidence. If grounds have been

proven, appellant urges this Court to find that it is not in the children's best interests to terminate the appellant's parental rights.

The trial court simply reiterated its earlier findings to support the decision of termination based upon the best interests of the children. The court did not make specific findings as to why termination was in the best interests of the children.

In Santosky, the Court acknowledged the ability of the State to overwhelm the parents' ability to mount a defense in a termination proceeding. *Id.* at 763. "Indeed, because the child is already in agency custody, the State even has the power to shape the historical events that form the basis for termination." *Id.* at 763.

The appellant refers this Court to the numerous procedural due process violations, the efforts of the Division of Family Services and the foster parents to sever all ties between the children and the appellant, and the unconstitutionality of RSMo 211.447 and RSMo 211.183 as set forth in this brief and under which the appellant's rights were abridged and finally terminated. The appellant suggests that the combined actions and inactions of the court and the parties created a situation in which the children would be alienated from the appellant through no fault of her own.

The dilemma is whether, after this alienation has occurred, it is in the best interests of the minor children to terminate the appellant's parental rights. Appellant suggests that it is not. But for the improprieties set forth in this brief, the children would have maintained their relationship with the appellant. The present ties between mother and child are tenuous, but not because of the appellant's actions. If termination is considered to be in the best interests of the children based upon the absence of a normal mother-child relationship, then a gross miscarriage of justice has occurred.

The Adoption and Safe Families Act is designed to prevent situations where children languish in foster care, and it serves as the mandatory pattern for Missouri's termination process. It is worthwhile to note that Section 401 of that Act states:

> "Nothing in this Act is intended to disrupt the family unnecessarily or to intrude inappropriately into family life, to prohibit the use of reasonable methods of parental discipline, or to prescribe a particular method of parenting." PL 105-89, Sec. 401 (42 U.S.C. 671 note).

The events in this case as set forth in the record clearly show that the state's actions have violated Congressional intent and have tragically

damaged and finally severed the sacred bonds between a mother and her children. The trial court abused its discretion in finding it was in the best interests of the children to terminate the appellant's parental rights.

Briefing on the issue below was requested by the Court in its Order dated May 28, 2003.

Contributing to the brief on this issue is:

Mr. Justin A. Harris Mo Bar # 51450
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The issue is whether an indigent appealing a judgment terminating her parental rights may be required to pay, as a condition of her right to appellate review, the costs of preparing the record on appeal, copying exhibits, and printing and copying briefs, and if not, who should bear those costs in order to permit appellate review.

The Due Process and Equal Protection Clauses of the Fourteenth Amendment prevent the State of Missouri from requiring an indigent appellant to pay those costs as a condition of appellate review of a judgment terminating Appellant's parental rights. For the reasons indicated herein, the Division of Family Services should be ordered to advance those costs.

AUTHORITY

Community Bancshares, Inc. v. Secretary of State, 43 S.W.3d 821 (Mo.banc 2001)

Hatcher v. Hatcher, 103 S.W.3d 860 (Mo.App.E.D. 2003)

In the Interest of F.A.C., 973 S.W.2d 157 (Mo.App.W.D. 1998)

In the Interest of J.P., 947 S.W.2d 442 (Mo.App.W.D. 1997)

M.L.B. v. S.L.J., 519 U.S. 102 (1996)

Matter of Guardianship of G.S., 644 A.2d 1088 (N.J. 1994)

Santosky v. Kramer, 455 U.S. 745 (1982)

13 C.S.R. 40-30.020 (May, 2003)

13 C.S.R. 40-30.020 Emergency Amendment (December 16, 2002)

13 C.S.R. 40-30.020 Proposed Amendment (December 16, 2002)

Missouri Supreme Court Rule 116.01

Missouri Supreme Court Rule 4-1.3

Missouri Supreme Court Rule 4-6.1

Missouri Supreme Court Rule 4-6.2

Missouri Supreme Court Rule 77.03

Missouri Supreme Court Rule 81.12

Missouri Supreme Court Rule 84.08

Section 211.462 RSMo 2002

Statement of Facts

Appellant applied as an indigent for court-appointed counsel in the underlying juvenile abuse and neglect case on September 4, 2001. (LF 1). Counsel was appointed for her on September 17, 2001. (LF 1).

Meanwhile, the foster parents filed their petition to terminate parental rights and for adoption on July 30, 2001. (LF 208, 212). Court-appointed counsel in the juvenile case then entered her appearance on behalf of Appellant in the collateral adoption case on October 9, 2001. (LF 209). The two cases were consolidated on June 27, 2002. (LF 4).

Trial was held on the termination of parental rights, and judgment was entered against Appellant on November 21, 2002. (LF 8). Appellant timely filed her notice of appeal, her motion to appeal in forma pauperis and for waiver of costs, and her request for a transcript with the trial court. (LF 9). Her motion was granted and the transcript ordered by the Newton County Circuit Clerk. (LF 9). The cost of preparing the transcript was $1,287.36 and was paid for by the Newton County Circuit Clerk. (A 122).

Appellant then filed her motion for costs with this Court, requesting that the Division of Family Service advance sufficient funds to her counsel for preparing copies of the record on appeal. The legal file and exhibits consisted of 826 pages. Seven copies were required for this Court and all parties involved.

This Court ordered the Newton County Circuit Clerk to prepare the legal file and all required copies for Appellant in its Order of May 28, 2003. The cost of preparing the legal file was $1,314.00. (A 121).

The appellant motioned this Court to order the Division of Family Services to provide $330.00 to appellant's counsel for costs of making 20 copies of appellant's brief and appendix. Appellant's motion was overruled on August 26, 2003. Funds for copying and shipping appellant's brief were provided through donations made by 26 solo and small firm attorneys throughout the State of Missouri.

Argument

1. COPIES OF THE RECORD AND BRIEFS ARE NECESSARY IN ORDER TO OBTAIN APPELLATE REVIEW OF A JUDGMENT TERMINATING APPELLANT'S PARENTAL RIGHTS.

Appellant must provide copies of the transcript and the legal file to this Court and all parties in order to pursue her appeal. Rule 81.12. Appellant is also required to provide copies of her briefs to the Court and all parties to proceed with her appeal. Rule 84.05. Without the required record and briefs, her appeal cannot proceed and will be dismissed. Rule 84.08. See, e.g., Hatcher v. Hatcher, 103 S.W.3d 860 (Mo. App. E.D. 2003) (dismissing an appeal for failing to file the record on appeal pursuant to Rules 81.12(d) and 81.18).

2. THE STATE CANNOT, CONSISTENT WITH APPELLANT'S FOURTEENTH AMENDMENT DUE PROCESS AND EQUAL PROTECTION RIGHTS, CONDITION APPELLANT'S RIGHT TO APPEAL THE TERMINATION OF HER PARENTAL RIGHTS ON PAYMENT OF THE COSTS OF PREPARING THE TRANSCRIPT, LEGAL FILE, AND BRIEFS NECESSARY UNDER COURT RULES TO SECURE APPELLATE REVIEW.

The Supreme Court of the United States recognized that natural parents have a fundamental liberty interest in the care, custody, and management of their children in Santosky v. Kramer, 455 U.S. 745, 753-54 (1982).

> "The fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State. Even when blood relationships are strained, parents retain a vital interest in preventing the irretrievable destruction of their family life. If anything, persons faced with forced dissolution of their parental rights have a more critical need for procedural protections that do those resisting state intervention into ongoing family affairs. When the State moves to destroy weakened familial bonds, it must provide the parents with fundamentally fair procedures." *Id.*

Prior to Santosky, in Boddie v. Connecticut, 401 U.S. 371, 374 (1971), the Court had determined that states could not deny access to the courts when parties seeking a dissolution of marriage were unable to pay costs because the state controlled the sole means of dissolving marriages.

The Court extended Boddie and Santosky in M.L.B. v. S.L.J., 519 U.S. 102 (1996). In M.L.B., the appellant, a mother whose parental rights were terminated by the State of Mississippi, was denied the right to appeal

based upon her inability to pay $2,352.36 in advance for preparation of the record on appeal. *Id*. at 106. The question presented to the Court was: "May a State, consistent with the Due Process and Equal Protection Clauses of the Fourteenth Amendment, condition appeals from trial court decrees terminating parental rights on the affected parent's ability to pay record preparation fees?" *Id.* at 107.

The Court in M.L.B., recognizing that "few consequences of judicial action are so grave as the severance of natural family ties," determined that Mississippi could not deny the appellant, "because of her poverty, appellate review of the sufficiency of the evidence on which the trial court found her unfit to remain a parent." *Id.* at 107, 119. The Court based its decision on both equal protection and due process concerns. *Id.* at 120. "The equal protection concern relates to the legitimacy of fencing out would-be appellants based solely on their inability to pay core costs." *Id.* "The due process concern homes in on the essential fairness of the state-ordered proceedings anterior to adverse state action."

Appellant established indigence with the trial court and obtained a trial court order allowing her to appeal without being required to prepay fees, costs, nor to give security therefore. A fundamental is right at stake and Appellant is entitled to appeal the trial court's ruling. Can the State,

consistent with the Due Process and Equal Protection Clauses of the Fourteenth Amendment, condition Appellant's right to appellate review of the judgment terminating her parental rights on payment of the costs of preparing the record on appeal, copying exhibits, and printing and copying briefs. Under M.L.B., the State must provide a means for Appellant, as an indigent, to obtain appellate review of the judgment terminating her parental rights, including providing for the payment of the costs necessary to proceed.

3. PROVIDING ACCESS TO APPELLATE REVIEW FOR INDIGENTS WHOSE PARENTAL RIGHTS HAVE BEEN TERMINATED REQUIRES ADVANCE PAYMENT FOR COSTS ON APPEAL.

Current Missouri law shows great concern for indigents against whom the State has marshaled its assets in order to terminate parental rights. The Missouri Legislature provides for court-appointed counsel for indigents in termination of parental rights cases. RSMo 211.462.2. The Legislature also requires the county in which the proceeding is instituted to pay court costs, unless the court requires the agency or person having or receiving legal or

actual custody to pay the costs. RSMo 211.462.4. The statute does not mention when the costs have to be paid.

The Rules of this Court establish entitlement to representation for indigents in all phases of juvenile proceedings, and require representation through appeal. Rule 116.01(a), (d), and (f).

The Department of Social Services, Division of Family Services, anticipates assuming the expenses associated with terminating the parental rights of indigents, including attorney fees and costs. 13 CSR 40-30.020. The promulgation history of this rule shows the State's intent to provide adequate representation for individuals unable to afford their own defense, and the recognition of the compelling governmental interest in doing so. 13 CSR 40-30.020 Emergency Amendment (Emergency Statement, Missouri Register, Vol. 27, No. 24 December 16, 2002, stating "the division finds a compelling governmental interest in assuring adequate representation for individuals"). (A 15).

The "Proposed Amendment" to 13 CSR 40-30.020, issued by the Department of Social Services states:

> "PUBLIC COST: This proposed amendment will not cost state agencies or political subdivisions more than five hundred dollars ($500) in the aggregate."

Missouri Register, Vol. 27, No. 24, December 16, 2002.

(A 16).

Contrary to the Division of Family Service's statement regarding the public costs of its rule, the Newton County Circuit Clerk has incurred expenses in preparation of the transcript and record on appeal of $2,601.36.

The final rule became effective June 30, 2003. 13 CSR 40-30.020. (A 18). It provides for payment of attorney fees, reasonably incurred expenses including the costs of transcripts authorized by the court, and extraordinary expenses including psychiatric/psychological/medical evaluations, expert witnesses, and depositions. *Id*. at (A), (C). According to the rule, these fees and costs are to be reimbursed at the conclusion of representation at trial and/or appeal. *Id*.

As noted in the authorities cited above, due process and equal protection prohibit the State from requiring payment of these costs in order to obtain access to the appellate courts. Missouri law requires the county, the Division of Family Services, or the person having or receiving custody to pay the costs. RSMo 211.462.2.

In this case, there are three options:

1. Appellant's court-appointed counsel can bear the cost of producing the legal file, transcript, and briefs;

2. Newton County can bear those costs; or

3. The Division of Family Services can bear those costs.

From court-appointed counsel's perspective, the question is whether she can afford to fund the expenses of an indigent's appeal with hope for eventual reimbursement from the Division pursuant to 13 CSR 40-30.020. For solo practitioners such as Appellant's counsel, advancing approximately $3,000 in costs for the duration of an appeal would create considerable hardship, if it is even possible.

From the county's perspective, the question is whether that political subdivision is required to fund unanticipated and unbudgeted expenses for indigent appeals. Requiring a county to fund these costs would conflict with the fiscal note contained in the Division's Proposed Amendment, where costs to political subdivisions were represented to be less than $500.00 in the aggregate. 13 CSR 40-30.020 does not contemplate, nor provide for, a county making a claim for reimbursement of costs from the Division.

From the Division's perspective, the question is whether payment of Appellant's costs is made before or after the appeal. 13 CSR 40-30.020 requires the Division to pay the costs if the trial court makes the finding of indigency in a termination of parental rights case. It is not a question of whether the costs will be paid by the Division, but when they will be paid.

The most important perspective is that of Appellant. The State is using awesome power to terminate her parental rights and the consequences of error are most grave. If her counsel is unable to financially bear advancing the costs of the appeal, she will be denied her rights to due process and equal protection secured by the United States Constitution.

Missouri attorneys are obligated to provide pro bono public service and act with reasonable diligence in representing underprivileged clients. (Rules of Professional Conduct 4-1.3 and 4-6.1). Attorneys have a professional responsibility to assist in providing pro bono public service by appointment, unless representing the client is likely to result in an unreasonable financial burden on the lawyer. (Rules of Professional Conduct 4-6.2). Indeed, all attorneys in Missouri have sworn the Oath of Admission stating, in part: "That I will practice law to the best of my knowledge and ability and with consideration for the defenseless and oppressed."

In many cases, court-appointed counsel for indigent clients are fairly new to the bar and still trying to establish financial integrity. When an attorney is appointed to represent a client in a termination proceeding, the attorney understands that much of that representation will be unpaid. Even if attorney fees are paid pursuant to 13 CSR 40-30.020, payment is at a rate

lower than that paid by fee clients. However, when undertaking representation as court-appointed counsel on appeal of a termination of parental rights case, it is not anticipated that counsel is required to fund the cost of preparing the record for appeal. Requiring court-appointed counsel to expend large sums in providing the appeal record and copies of briefs places an unfair burden on counsel and may eliminate many attorneys who might otherwise be willing to represent poor persons on appeal.

In a termination of parental rights case, the Missouri Western District Court of Appeals found that the term costs in RSMo 211.462.4 included deposition costs and witness fees, and those costs could be taxed against the Division of Family Services. In the Interest of J.P., 947 S.W.2d 442 (Mo. App. W.D. 1997). The trial court in J.P. ordered, upon a motion by counsel for the natural mother, that deposition costs be taxed to the Division. *Id.* at 443. These costs could be taxed against the Division of Family Services because RSMo 211.462.4 "assumes that there will be expenses associated with termination proceedings that are appropriately taxed as costs," and the court may place responsibility for costs upon the Division of Family Services. *Id.* at 445-46.

The Western District later rejected the natural mother's appeal from a trial court's denial of her request for advance costs to cover deposition

expenses. In the Interest of F.A.C., 973 S.W.2d 157, 160 (Mo. App. W.D. 1998). The Western District's opinion was based on the trial court's finding that there was no showing that a fundamental right of the mother would be denied if deposition costs were not advanced. *Id.* at 159. Thus, the Court recognized that prepayment of costs may be allowed if a fundamental right is at stake.

The F.A.C. court pointed out that § 211.462, RSMo, did not require prepayment of costs, but "makes assessment of costs an exercise of the juvenile court's discretion." *Id.* at 159-60. "While the J.P. court recognized that deposition costs *could be* taxed to DFS in the right situation, it recognized that the decision was a matter of discretion." *Id.* at 160.

The request for advance funding of discovery depositions in the above cases differs from the present case before this Court. Here, the *only* means available to the appellant to protect her constitutional liberty interest is through appeal where provision of the record on appeal and briefs is mandatory. Her appeal is the sole means of assuring the correctness of the decision to permanently sever her parental rights. In the cited cases, there were other discovery options available and termination of parental rights had not yet occurred.

The Division of Family Services would have this Court read into § 211.462, RSMo, a requirement that costs not be paid until this appeal is terminated. An agency rule which attempts to modify or extend a statute is invalid and void. Community Bancshares, Inc. v. Secretary of State, 43 S.W.3d 821, 824 (Mo.banc 2001).

Requiring the Division of Family Services to advance funds to counsel for indigents for purposes of preparing the record and briefs necessary for appeal supports the public policy of providing due process and equal protection to poor persons when the State takes action threatening a fundamental right. Those rights are guaranteed by the United States Constitution. The Division is best prepared to cover these costs, it anticipates paying for costs, and whether those costs are paid prior to trial or after, the ultimate expense for the agency is the same.

In Matter of Guardianship of G.S., 644 A.2d 1088 (N.J. 1994), the New Jersey Supreme Court considered the issue of which entity, under its termination of parental rights scheme, was required to advance the cost of preparing the transcript for an indigent appellant. That court ultimately concluded that the New Jersey Division of Youth and Family Services (its counterpart to Missouri's Division of Family Services), was responsible for advancing the costs in that case. "In cases seeking termination of parental

rights pursuant to Title 30, in the absence of any other source of funds, DYFS shall be obliged to provide the services to indigent parties necessary to their defense other than legal representation." Id. at 179. Recognizing the necessity for due process and equal protection in prosecuting these cases against indigents, the Court further stated, "we believe that if the Legislature had to choose between providing transcripts to indigents from the agency's general appropriations or ending the agency's child-welfare programs involving termination of parental rights, it would choose the former." *Id.*

Appellant requests this Court consider the nature of the fundamental rights at issue in this case, and the need to provide access for indigents in termination of parental rights cases to the appellate courts, and find that the Court has the discretion to order the Division to advance these costs, consistent with the Western District's opinions in J.P. and F.A.C.

CONCLUSION

For the reasons stated above, the termination of appellant's parental rights should be reversed. The minor children should be immediately returned to the appellant's care and custody, or, in the alternative, the Division of Family Services should be instructed to initiate a period of reintroduction under the supervision of the Newton County Juvenile Court with reunification as the goal. Costs of producing the legal file and transcripts for appeal should be reimbursed to Newton County by the Division of Family Services. Reasonable attorney fees, costs, and expenses should be paid by the Division of Family Services to the appellant's attorney and to those attorneys throughout the State of Missouri who contributed to the cost of reproducing the briefs.

Rule 84.06 Certification

The undersigned hereby certifies that this brief:

1. Complies with the limitations contained in Rule 84.06(b);

2. Contains 22,340 words;

3. The disk submitted with this brief has been scanned for viruses and is virus free.

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Certificate of Service

The undersigned hereby certifies that two true and correct copies of the appellant's brief were hand delivered or sent by U.S. Mail, postage prepaid, to each of the following attorneys of record on the _____ day of September, 2003.

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